FILED
06-68 JUL 13 2006
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KENNETH A. MAUDER,
Petitioner,

v.

METROPOLITAN TRANSIT AUTHORITY
OF HARRIS COUNTY, TEXAS
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH Y. AHMAD
Counsel of Record
AHMAD, ZAVITSANOS
& ANAIPAKOS, P.C.
3460 ONE HOUSTON CENTER
1221 MCKINNEY STREET
HOUSTON, TX 77010-2009
(713) 655-1101
(713) 655-0062 FAX

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc. 800.890.5001

Questions Presented

Whether an employee must be physically unable to travel to his place of employment in order to be considered "incapacitated" pursuant to 29 C.F.R. § 825.114(a)(2)(iii) when he is unable to perform one or more essential functions of his job due to a chronic serious health condition.

Whether an employer must allow an employee fifteen days to return the FMLA certification packet upon formal request for intermittent FMLA leave in accordance with 29 C.F.R. § 305.

Statement Pursuant to Supreme Court Rule 29.6

Respondent Metropolitan Transit Authority of Harris County, Texas is a local transit authority. None of the parties involved in this case are part of publicly traded corporations or publicly held companies.

TABLE OF CONTENTS

Questions Presented i

Statement Pursuant to Supreme Court Rule 29.6 ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Basis for Jurisdiction 2

Statutory Provisions Involved 2

Statement of the Case 2

A. Summary of Case 3

1. Work history of Kenneth Mauder 3

2. Mauder is Diagnosed with Diabetes 3

3. Mauder Experiences Diarrhea from his Diabetes Medication 4

4. Metro's response to Mauder's Diabetes 4

5. Metro Insists that Mauder Change his Medication 6

6. Mauder is Placed on Probation 8

7. Mauder Specifically Requests FMLA Leave . 9

B. The Decision Below 10

Reasons for Granting the Petition 11

Argument 13

Question 1 13

Question 2 21

Conclusion 24

Appendix

Appendix A - Fifth Circuit Opinion
dated April 14, 2006 . . . . . 1a

Appendix B - District Court Decision and Order
dated March 28, 2005 . . . . . 19a

Appendix C - Statutory and Regulatory
Provisions Involved. 42a

TABLE OF AUTHORITIES

Cases

Banks v. CBOCS West, Inc.,
2005 WL 1126913 (N.D. Ill. 2005) 17

Bauer v. Varity Dayton-Walther,
118 F.3d 1109 (6th Cir. 1997) 20

Bond v. Abbott Laboratories,
7 F.Supp. 2d 967 (N.D. Ohio 1998) 19

Electrolux Home Prod. v. United Auto. Aerospace & Agr. Implement,
416 F.3d 848 (8th Cir. 2005) 16, 17

Henderson v. Cent. Progressive Bank,
2002 WL 31086086 (E.D. La. Sept. 17, 2002) 19

McClain v. Sw. Steel Co., Inc.,
940 F. Supp. 295 (N.D. Okla. 1996) 17

Myers v. Bridgestone/Firestone Long-Term Disability Benefits Plan, 2005 WL 1240603
(E.D. Tenn. 2005) 17

Sabbrese v. Lowe's Home Centers, Inc.,
320 F. Supp. 2d 311 (W.D. Pa. 2004) 17, 18

Satterfield v. Wal-Mart Stores, Inc.,
135 F.3d 973 (5th cir. 1998) 21

Victorelli v. Shadyside Hosp.,
128 F.3d 184 (3d Cir. 1997) 18

Statutes, Rules and Regulations

28 U.S.C. § 1254 2
28 U.S.C. § 1331 2
28 U.S.C. § 2101 2
29 U.S.C. § 2601, *et seq.* . . . . . *passim*
29 U.S.C. § 2612(a)(1)(B) 13

SUP.CT.R. 10(a) and (c) 1
SUP.CT.R. 13.1 2

29 C.F.R. § 825.114 . . . . . *passim*
29 C.F.R. § 825.115 . . . . . 14, 16
29 C.F.R. § 825.305 . . . . . 1, 22, 23

PETITION FOR WRIT OF CERTIORARI

Respondent's Motion for Summary Judgment was granted based on the district court's misinterpretation of two regulations governing the Family and Medical Leave Act ("FMLA"). First, the district court misinterpreted the regulation governing the definition of a "serious health condition" under the FMLA. Based upon this misinterpretation of the law, the district court determined that Petitioner failed to present sufficient evidence of incapacity, and therefore, failed to present evidence that he suffered from a "serious health condition" as required by the FMLA.

Second, the Court misinterpreted the regulation governing the procedures to which an employer must adhere when an employee requests FMLA leave. Based upon this misinterpretation, the district court held that an employer need not allow the employee fifteen days to return the FMLA certification packet, despite the requirement of the applicable regulation, 29 C.F.R. § 825.305(b).

The reasoning of the district court, which was subsequently affirmed by the United States Court of Appeals for the Fifth Circuit, directly conflicts with the applicable regulations promulgated by the United Sates Department of Labor, as well as decisions from courts within other circuits. As a result, it is clear that the lower courts require guidance from this Court on these two important questions under the FMLA. Accordingly, the Court should grant the petition for writ of certiorari. *See* SUP.CT.R. 10(a) and (c).

Opinions Below

The ruling of the United States Court of Appeals for the Fifth Circuit dated April 14, 2006 affirming the decision of

the District Court is officially reported at 446 F.3d 574. App. A at 1a.

The decision and order of the United States District Court for the Southern District of Texas, Houston Division granting Defendant's Motion for Summary Judgment dated March 28, 2005 is unreported. App. B at 19a.

Basis for Jurisdiction

The order of the United States Court of Appeals for the Fifth Circuit for which Petitioner seeks review was entered on April 14, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provision Involved

The relevant statutory provisions are contained in the Family Medical Leave Act ("FMLA"), 29 U.S.C. §2601, *et seq.*, as well as the applicable regulations promulgated by the Department of Labor, 29 C.F.R. § 825.100, *et seq.*, set out in App. C at 42a.

Statement of the Case

The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction). Petitioner's federal claim is based upon allegations that the Respondent violated the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* The district court granted defendant's Motion for Summary Judgment on March

28, 2005. The record consists of the pleadings filed with the Court.

A. Summary of Case

Appellant brought this action complaining of violations of the FMLA by Defendant, specifically that Defendant unlawfully denied Mauder his rights under the FMLA, and that Defendant interfered with Mauder's rights under the FMLA.

1. Work History of Kenneth Mauder

Mauder began working for the Metropolitan Transit Authority of Harris County, Texas ("Metro") as a Senior Support Center Analyst in Metro's Information Technology ("IT") support center in June 1999. (R. 411). Mauder's job duties included providing technical support for resolving internal customer's technology problems, as well as assisting others in the IT department. (R. 411).

2. Mauder Is Diagnosed with Diabetes

In March 2002, Mauder was diagnosed by his regular treating physician, Dr. John Reeves, with Type II diabetes. (R. 412, 420). Mauder promptly notified Metro of this diagnosis. (R. 412). Dr. Reeves prescribed Mauder medication to treat the diabetes by stabilizing his blood sugar level. (R. 412, 420). The medication initially prescribed to Mauder was ineffective. (R. 412, 420). To further pursue successful treatment, in April 2002, Dr. Reeves prescribed Metformin to treat Mauder's diabetes. (R. 412, 420).

3. Mauder Experiences Diarrhea from his Diabetes Medication

Upon taking the prescribed Metformin to treat his diabetes, Mauder began to experience diarrhea as a side effect. (R. 412). Specifically, Mauder began to experience sudden and unpredictable onsets of diarrhea, the frequency, duration and intensity of which he could not control. (R. 412). As a result, when Mauder began to sense the onset of a bowel movement, he was required to go to the restroom almost immediately. (R. 412). Moreover, due to the nature of the affliction Metformin wrought upon him, the length of time Mauder needed in the bathroom to pass his stools was greater than the time he had previously needed to use the bathroom. (R. 412). When Mauder went to the restroom upon the onset of a bowel movement, he required approximately 15 minutes in the restroom to pass the loose stools because of the diarrhea he was experiencing. (R. 412, 422). As a result, Mauder was medically required to leave his work station for restroom breaks at unscheduled times. (R. 412, 420-22).

4. Metro's Response to Mauder's Diabetes

In May 2002, Mauder was notified by his supervisor, Vel Watkins, that he was in violation of the newly implemented support center attendance policy. (R. 412, 425). Specifically, Watkins informed Mauder that he was exceeding his allowable break times that she had established as a part of a new attendance policy. (R. 412, 435). Watkins had set Mauder's break schedule for 9:00 a.m.-9:15 for his morning break and 2:00 p.m.-2:15 p.m. for his afternoon break. (R. 413).

In response, Mauder explained to Watkins that the medication that he had been prescribed to treat his diabetes was causing him to experience severe diarrhea. (R. 413). As a result, he could not always hold his bowel movements until his scheduled break time. (R. 413). Moreover, if Mauder was required to try to force himself to use the restroom during his scheduled break times, it may take him extended periods of time in the bathroom, making him late in returning from his break. (R. 413).

Mauder was frequently unable to pass his stools during his scheduled break time. (R. 413). This left Mauder no other reasonable option other than to use the restroom at times other than his scheduled breaks, for which he was reprimanded, and eventually terminated. (R. 413-16, 439, 444-45, 448-49, 451-52, 456-57 and 461-62).

Mauder explained to Metro that the medication was effective in stabilizing his blood sugar level, and that previous medications that he had tried were not so effective. (R. 413). In response, Metro asked Mauder to submit a note from his treating doctor to verify the information provided by Mauder. (R. 413). In accordance with Metro's request, Mauder obtained a note from Dr. Reeves, and provided it to Metro. (R. 413, 421, 468). According to Dr. Reeves, the Metformin prescribed to Mauder was causing the side effect of diarrhea. (R. 420-21, 468). Dr. Reeves also explained that the condition should improve. (R. 421, 468). For the time, however, Dr. Reeves clearly informed Metro that Mr. Mauder needs frequent breaks from work to go the bathroom due to the medication that he had been prescribed. (R. 421, 468).

5. Metro Insists that Mauder Change his Medication

This was not sufficient for Metro. (R. 413). Rather, Ms. Watkins instructed Mauder to change the medication that he was taking to treat his diabetes. (R. 413). In an attempt to accommodate, Mauder conferred with Dr. Reeves about the possibility of changing to another medication to treat his diabetes. (R. 413). Dr. Reeves concluded that because the Metformin had proven to be effective in stabilizing Mauder's blood sugar level, while other medications had not been effective, he should stay with the Metformin.(R. 413, 421).

Mauder promptly notified Metro what the doctor had concluded, and explained that he could not change his medication without risking his health. (R. 414). Mauder then asked Watkins for a flexible break schedule that would allow him to use the bathroom as he needed, so that he would not be taking excessive breaks, and could complete his breaks within the 15 minute break schedule. (R. 414). Metro refused this request, and instructed Mauder to take his breaks at the scheduled times. (R. 414).

The side effects of diarrhea that Mauder experienced from the Metformin did not subside, leaving Mauder with the unenviable choice between soiling himself at his desk and risking further illness, or violating Watkins' policy. (R. 414, 421). Consequent to Mauder's obvious choice, Ms. Watkins continued to inform Mauder that if he did not conform to her standard for break schedules, he could potentially be reprimanded in the future. (R. 414).

On June 19, 2002, Ms. Watkins issued Mauder his 2002 Annual Performance Appraisal. (R. 470-71). Notably, the overall rating of the appraisal was "satisfies most." (R. 470-

71). In other words, although Mauder had exceeded the allotted time for his breaks, his job performance had not suffered. (R. 470-71). Nevertheless, less than two weeks after Mauder received his Annual Performance Appraisal, Ms. Watkins issued Mauder a documented verbal warning for tardiness. (R. 435). Mauder again requested that he be allowed a flexible break schedule that was in accordance with his needs to use the restroom due to the effects of the Metformin. (R. 414). Once again, Metro refused his request. (R. 414).

On August 9, 2002, Metro issued Mauder a written reprimand due to the extended breaks that Mauder was taking. (R. 474-75). In response, Mauder explained that if he were allowed to take a restroom break at a flexible time, as opposed to within the set break schedule, this would not be an issue. (R. 414). Metro again refused Mauder's request. (R. 414). Notably, Metro once again confirmed that despite Mauder's technical infractions, his job performance had not suffered. (R. 474-75).

Mauder became concerned that reprimands for tardiness were being placed in his personnel file. (R. 414). As a result, Mauder again approached his supervisor about his diabetes, and explained that the side effects he was experiencing from the medication to treat his diabetes had not subsided. Mauder further explained that his doctor had informed him that the diarrhea may indeed be a permanent side effect of taking Metformin. (R. 414, 421). Mauder also obtained another note from his doctor to explain that the side effects Mauder experienced from Metformin are not always temporary. (R. 414, 421, 478). Mauder obtained this note on September 10, 2002, and again requested a flexible break schedule due to the side effects that he was continuing to experience. (R. 414-15, 478). Although Mauder's supervisor

knew that Mauder had submitted this note in support of his request, she testified that she did not think that she needed to see it. (R. 426-29). Watkins also once again refused Mauder's request. (R. 415). Notably, even though Watkins was Mauder's direct supervisor, she testified that she had never read Metro's FMLA policy, and did not even know that intermittent leave was available under the FMLA. (R. 430, 491-93).

6. Mauder is Placed on Probation

Rather than grant Mauder's request for a flexible break schedule, two days after Metro received the second note from Dr. Reeves, Metro placed Mauder on a 30-day probation effective Friday, September 13, 2002. (R. 444-45). Metro further informed Mauder that if he failed to adhere to the established guidelines during his probation, he would be terminated. (R. 444-45). Notably, Mauder was placed on probation for issues concerning not ready mode and total available time. (R. 444-45). Although Mauder had never been issued any previous counseling for his not ready mode or total available time, Metro placed him on probation for this conduct with no previous warning and threatened him with termination. (R. 444-45). This was the first time that Mauder had ever been told that his performance was allegedly at issue. (R. 415).

According to Metro's own progressive disciplinary policy, an employee should first be warned with a documented verbal warning, followed by a written reprimand. (R. 487-89). Moreover, after the third step in the progressive disciplinary system, probation, the employee should be subjected to a three-day suspension without pay. (R. 487-89). After a three-day suspension without pay, termination is the next step. (R. 487-89). In this case, not only did Metro begin

counseling Mauder on these alleged performance problems with a probation, but Metro also informed Mauder that he would be terminated immediately following the probationary period rather than face a three-day suspension without pay. (R. 444-45).

After he was placed on probation, Mauder was issued weekly reports on his not ready mode and total available time. (R. 415). Each time, Mauder made it clear that he could not meet those standards because of the side effects that he was experiencing due to the medication he was taking to control his diabetes. (R. 415). Specifically, Mauder explained that because of his medical issues, he was required take bathroom breaks at unscheduled times, and that he required periods of up to 15 minutes in the restroom due to his loose stools. (R. 415).

Nevertheless, Metro refused to either allow Mauder additional time to use the restroom, or to allow him to use the restroom at the times he needed, rather than at a set time dictated by Metro. Upon what seemed to be Metro's final refusal to consider Mauder's request for a flexible break schedule to allow him to use the restroom as he needed to, Mauder made a last attempt at resolution. He requested to be transferred to an available technician position within Metro for which he was both certified and qualified. (R. 415). Metro refused to consider Mauder's request. (R. 415).

7. Mauder Specifically Requests FMLA Leave

Finally, on October 4, 2002, Mauder formally requested intermittent leave of thirty minutes per day, and ***specifically mentioned*** the Family and Medical Leave Act. (R. 415, 495). In response, Pam Thomas, who worked in the Human Resources Department, confirmed that she had received

Mauder's FMLA request, and also confirmed Mauder's receipt of the FMLA packet to be completed. (R. 495). Importantly, although Pam Thomas knew that Mauder's probation ended October 11, 2002, she informed Mauder that in accordance with the FMLA, he had 15 days, until October 19, 2002, to return the FMLA request and certification packet. (R. 495). Accordingly, Mauder believed that based upon Thomas' instruction to return the packet by October 19, that his probation would likewise be extended until the FMLA packet had been returned. (R. 416). However, on October 11, 2002, prior to the expiration of the 15-day period set forth in the FMLA, Mauder was terminated. (R. 416).

B. The Decisions Below

District Judge Melinda Harmon court granted defendants' Motion for Summary Judgment on January 24, 2005 ruling that:

1. Mauder was never "incapacitated" and therefore does not suffer from a serious health condition because Mauder was not required to leave Metro's premises. Appendix B, p. 34a-35a;

2. The FMLA does not allow for breaks *during* the day due to a serious health condition. Appendix B, p. 35a (emphasis in original);

3. Because the FMLA does not contain a reasonable accommodation element, the FMLA did not require Metro to facilitate Mauder's return to his position at the conclusion of his leave. Appendix B, p. 35a-36a;

4. Mauder was not entitled to FMLA protection because he was unable to perform the essential functions of the

job during his need for intermittent leave. Appendix B, p. 35a-36a; and

5. Metro was not required to allow Mauder fifteen days to return the FMLA certification packet because it had already placed Mauder on a thirty-day corrective action plan. Appendix B, p. 29a.

Mauder filed an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the district court's ruling stating that Mauder failed to establish that his serious health condition left him incapacitated as required by the FMLA, as well as the ruling that Metro's failure to allow Mauder fifteen days to return the FMLA certification packet did not constitute interference with Mauder's FMLA rights. 446 F.3d at 581-82, 585.

REASONS FOR GRANTING THE PETITION

This case presents two important issues of federal law under the FMLA. Enacted in 1993, the FMLA is a relatively new statute. As a result, there is little guidance from this Court regarding the proper interpretation of the statutory language, as well as the applicable regulations promulgated by the Department of Labor. As a result, a number of inconsistent decisions interpreting the statute and the regulations have been issued, causing substantial confusion in the courts. By granting this Petition for Certiorari, this Court can settle two critical issues often involved in cases arising under the FMLA.

The first issue concerns the legal requirements to establish a serious health condition under the FMLA. The ruling by the Fifth Circuit affirmed the district court's ruling that in order to show the requisite incapacity to establish a serious

health condition, a plaintiff must show that "the condition is so debilitating that the employee cannot physically go to work." This interpretation of the FMLA directly contradicts the applicable regulations promulgated by the Department of Labor, and substantially weakens the protection intended by the FMLA. Under this interpretation, many employees who qualify for FMLA protection would be left unprotected. Mauder's condition left him periodically unable to perform one or more of the essential functions of his job–the standard established by the applicable regulations, despite the fact that he was physically able to travel to his place of employment. By adding an additional requirement that the employee seeking FMLA protection be physically unable to travel to work, the Court of Appeals substantially limits the protection afforded by the FMLA, betraying the original intent of the Act.

The second issue concerns the procedures that an employer must follow when an employee specifically requests leave under the FMLA. Under the FMLA, in response to an employee's request for FMLA leave, the employer has the option to request medical certification to support the request. However, in the event that the employer does exercise its right to request medical certification, it must allow the employee at least fifteen days to return the certification. However, the Fifth Circuit affirmed the district court's ruling that because Metro had already place Mauder on a corrective action plan due to his break tardiness, it did not have to comply with the regulation allowing the employee fifteen days.

Both of these rulings directly conflict with the plain language of applicable regulations promulgated by the Department of Labor as well as decisions issued by federal courts within other circuits. Because these are both important

questions of federal law, the Petition for Certiorari should be granted, so that these issues may be settled by this Court.

Argument

Question 1:

Whether an employee must be physically unable to travel to his place of employment in order to be considered "incapacitated" pursuant to 29 C.F.R. § 825.114(a)(2)(iii) when he is unable to perform one or more essential functions of his job due to a chronic serious health condition.

The FMLA requires an employer to provide for a leave of absence in order for an employee to seek treatment for a serious health condition. 29 U.S.C. § 2612(a)(1)(B). Under the FMLA, a serious health condition entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves either inpatient care or continuing treatment by a healthcare provider. *See* 29 C.F.R. § 825.114. In this case, Mauder has not claimed a serious health condition involving inpatient care. Rather, Mauder alleges that he suffers a serious health condition involving continuing treatment by a healthcare provider.

Under the FMLA, a serious health condition involving continuing treatment by a healthcare provider includes 1) a period of incapacity of more than three consecutive days; 2) any period of incapacity due to pregnancy or prenatal care; or 3) any period of incapacity or treatment for such incapacity due to a *chronic* serious health condition. 29 C.F.R. § 825.114(a)(2) (emphasis added).

In this case, Mauder is not alleging a serious health condition due to a period of incapacity of more than three consecutive days, or a period of incapacity due to pregnancy or prenatal care. Rather, Mauder alleges that under 29 C.F.R. § 825.114(a)(2)(iii), he suffers from a serious health condition due to a period of incapacity or treatment for such incapacity due to a chronic serious health condition. Notably, under the regulations, diabetes is a recognized serious health condition that may cause epsiodic incapacity, *see* 29 C.F.R. § 825.114(a)(2)(iii)(C), and the Fifth Circuit acknowledged diabetes as a serious health condition. 446 F.3d at 579. Accordingly, the legal issue in this case is whether the chronic serious health condition caused the requisite episodic periods of incapacity for him to qualify for intermittent FMLA leave. 29 C.F.R. § 825.114(a)(2)(iii). 446 F.3d at 581.

Under the regulations, incapacity is defined as an inability to work due to the serious health condition, treatment therefor, or recovery therefrom. *See, e.g.*, 29 C.F.R. § 825.114(a)(2)(i). The regulations further state that an employee is unable to work if he or she is unable to perform any one of the essential functions of the employee's position. 29 C.F.R. § 825.115. In this case, Mauder presented sufficient evidence that he was periodically unable to work as a direct result of his diabetes, giving rise to the need for intermittent leave. Specifically, to treat his diabetes, Mauder was prescribed Metformin, which has a known side effect of diarrhea. (R. 412, 420).

Shortly after taking Metformin to control his blood sugar level, Mauder began to experience diarrhea. After experiencing the diarrhea, Mauder had Dr. Reeves attempt to control the side effects of the diabetes, but Dr. Reeves' suggestion was not successful. (R. 416, 421). Dr. Reeves determined that because Metformin was very effective in

stabilizing Mauder's blood sugar level, he recommended against changing Mauder's medication, since it could lead to a deterioration of his health. (R. 421).

As a result of the diarrhea he experienced solely because of his diabetes medication, Mauder could not hold his bowel movements until his scheduled break time. (R. 413). This required Mauder to take a separate restroom break at a time other than his scheduled break time. Nevertheless, Mauder's supervisor insisted that Mauder take his breaks at the time *she* designated, and informed him that he could have *no other additional breaks* to use the bathroom.

During the time that Mauder was required to spend in the bathroom, he clearly could not perform the functions of his job. (R. 412-13, 421-22). Indeed, this is precisely the reason given by Metro for Mauder's termination. (R. 413-16, 444-45, 448-49, 451-52, 456-57 and 461-62). Mauder thus presented sufficient evidence of episodic incapacity due to his medical condition.

The Fifth Circuit held otherwise, ruling that in order to qualify for intermittent leave under the FMLA, a plaintiff's condition must be "so debilitating that the employee cannot physically go to work." 446 F.3d at 581. In so holding, the Court departed from the standard set forth in the FMLA and the applicable regulations. Specifically, the standard under the FMLA is whether an employee who suffers from a serious health condition is periodically incapacitated due to the condition, and requires leave due to the incapacity. *See* 29 C.F.R. 825.114. There is no such requirement, in either the statute or the regulation, that the employee be physically unable to travel to his place of employment. Rather, the only requirement is that the employee be unable to work ***or*** unable to perform any one of the essential functions of his job. 29

C.F.R. 825.115. The fact that the Department of Labor phrased the definition in the disjunctive is telling–clearly indicating that it intended the definition to encompass more than just situations where an employee physically cannot go to the workplace.

In support of its decision, the Fifth Circuit relies upon several interpretations of the Act from other jurisdictions. 446 F.3d at 581. Moreover, a review of the cases relied upon by the Fifth Circuit from an assortment of federal jurisdictions highlights the myriad conflicting decisions being issued by the federal courts on this question, giving rise to the need for guidance from this honorable Court.

In *Electrolux Home Prod. v. United Auto. Aerospace & Agr. Implement*, 416 F.3d 848 (8th Cir. 2005), the Plaintiff suffered from gastroenteritis, gastritis and diarrhea. *Id.* at 852. Due to Plaintiff's medical condition, she missed three days due to the gastroenteritis, five days due to the gastritis and three days due to the diarrhea. *Id.* Based on this evidence, the Fifth Circuit held that the Eighth Circuit in *Electrolux required* that the plaintiff not physically be able to go to work. 446 F.3d at 581. On the contrary, the Eighth Circuit held the opposite:

> With decreased or no productivity, we are convinced many people could force themselves to stay on the job even though seriously ill. The fact that the arbitrator believed someone could be incapacitated and yet still force themselves to remain at work for a portion of a day is a reasonable interpretation of the term incapacitated. To hold otherwise would be to withhold FMLA protection unless an employee is taken from the workplace on a stretcher.

Electrolux Home Prod. v. United Auto. Aerospace & Agr. Implement, 416 F.3d at 855.

Indeed, none of the cases relied upon by the Fifth Circuit indicate a requirement that the Plaintiff be physically unable to travel to the workplace. *See McClain v. Sw. Steel Co., Inc.*, 940 F. Supp. 295 (N.D. Okla. 1996); *Banks v. CBOCS West, Inc.*, 2005 WL 1126913 (N.D. Ill. 2005); *Myers v. Bridgestone/Firestone Long-Term Disability Benefits Plan*, 2005 WL 1240603 (E.D. Tenn. 2005).

In fact, other federal courts have expressly held the opposite–that a short leave taken during the day can qualify as intermittent leave under the FMLA. *See Sabbrese v. Lowe's Home Centers, Inc.*, 320 F. Supp. 2d 311 (W.D. Pa. 2004). In *Sabbrese*, the Court concluded that a diabetic employee was entitled to periodic breaks during the day in order to correct his blood sugar level due to his diabetes if they were medically necessary. *Id.* at 322. The Court reasoned that the FMLA provides that an employee may take intermittent leave when medically necessary. *Id.* The Court further held, "[i]n this case, there is no dispute that plaintiff was required to eat in order to control his blood sugar. Defendant cites no cases for the proposition that, where it is medically necessary to consume food due to a diabetic or other condition, a lunch break or any other type of break cannot also qualify as intermittent leave." *Id.*

In this case, the same reasoning applies. Because of Mauder's condition, he was required to take unscheduled bathroom breaks, which were medically necessary as explained by Mauder's treating physician. (R. 421-422). Notably, the *Sabbrese* Court continued, "[t]he fact that an employee receives daily lunch and other breaks is not dispositive because there may be situations, such as the

present case, where a diabetic (or otherwise impaired) employee faces a medical emergency and is unable to comply with his employer's break policies, yet still must take unforeseeable intermittent leave." *Id.* There is little distinction between Mauder's bathroom breaks and Sabbrese's food breaks–both were medically necessary for the continuation of good health despite suffering from diabetes. Accordingly, the Fifth Circuit's analysis was erroneous, and directly conflicts with the statute, the applicable regulations and other decisions of federal courts.

Importantly, under the FMLA, the focus is on the effect of a particular medical condition, as opposed to the diagnosis itself. In this case, Mauder's diabetes causes him to have symptoms of severe diarrhea, which requires him to use the restroom, and which renders him periodically unable to perform the essential functions of his job. Therefore, Mauder should have been granted FMLA leave for his restroom breaks. Had Mauder been granted intermittent leave for his restroom breaks due to the effects of the Metformin, he would have met his supervisor's standards, and would not have been terminated for those reasons. (R. 444-45, 449-49, 451-52, 456-57, 461-62). Therefore, by terminating Mauder, Metro violated the FMLA by not allowing him intermittent leave and punishing him for the time away from his desk in the restroom–time that should have been granted as intermittent leave pursuant to the FMLA.

Notably, the District Court even acknowledged that the FMLA intends to protect employees who are periodically incapacitated by an ongoing medical problem such as diabetes. (R. 524). *See Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 190 (3d Cir. 1997). Strangely, however, the District Court proceeded to hold, without explanation, that based upon its interpretation of the case law, the occasional

breaks required by Mauder did not rise to a level of incapacity. (R. 523-24). However, a review of each of the cases on which the District Court relied in reaching its holding further illustrates the need for guidance from this Court.

In *Henderson v. Cent. Progressive Bank*, 2002 WL 31086086 (E.D. La. Sept. 17, 2002), the court found that because the plaintiff was not incapacitated for more than approximately ten to fifteen minutes per month as a result of the alleged serious health condition, the plaintiff did not qualify for leave under the FMLA. In this case, however, Mauder is incapacitated for approximately thirty minutes per day, or approximately 10 hours per month. Accordingly, the court's reliance on *Henderson* was misplaced.

In *Bond v. Abbott Laboratories,* 7 F.Supp.2d 967 (N.D. Ohio 1998), the court held that one plaintiff's routine tooth extraction and another plaintiff's tendinitis did not qualify as serious health conditions under the FMLA. Specifically, the court found that with respect to the tooth extraction, because the plaintiff's dental problem was routine, the condition does not qualify as a chronic condition, under the FMLA. With respect to the tendinitis, the court found that the plaintiff did not present sufficient evidence of an incapacity due to the alleged serious health condition, that would qualify her for leave under the FMLA. *Id.* at 977.

In this case, Mauder presented sufficient evidence that his condition is far from a routine condition, as well as sufficient evidence that he was incapacitated due to the condition. Specifically, as explained above, Mauder suffers from diabetes, which is a long-term condition, requiring ongoing medication to treat. In addition, Mauder presented sufficient evidence that he was incapable of working during the periods

that he required a break as a direct result of the diarrhea he experienced due to the medication he was taking for the diabetes.

Finally, in *Bauer v. Varity Dayton-Walther*, 118 F.3d 1109 (6th Cir. 1997), the court held that the plaintiff, who suffered from rectal bleeding, did not qualify for leave under the FMLA. In *Bauer*, however, the court found that the plaintiff did not produce sufficient evidence of an incapacity, to qualify him for leave under the FMLA. *Id.* at 1112. Rather, the plaintiff stated that the severity of his condition was not known and that it was possible that he suffered from a condition so severe that it would likely require absences in the future. *Id.* In this case, however, Mauder presented clear evidence that he was incapacitated on a daily basis, and that he would require intermittent leave due to the condition he was experiencing. As a result, the court's reliance on *Bauer* is misplaced as well. Rather, Mauder presented sufficient evidence that he suffers from a serious health condition under the FMLA entitling him to intermittent leave, which was denied.

In affirming the district court, the Fifth Circuit also noted that the parties disagreed as to the cause of Mauder's condition giving rise to the need for FMLA leave. 446 F.3d at 580-81. In fact, Mauder established that the incapacity was a direct result of his diabetes. Notably, Metro argued to the Fifth Circuit that Mauder cannot use a symptom of the diabetes–his diarrhea–to establish that he has a serious health condition under the FMLA. Rather, Metro argued that if the employee is using a symptom of the serious health condition to satisfy the "period of incapacity" element of the definition of "chronic serious health condition," *e.g.*, diarrhea, then the alleged combined condition must satisfy all three elements of the definition. In other words, under this argument, Mauder's

diarrhea must have required periodic visits to a health care provider. On the contrary, the regulations confirm that the FMLA is designed to incorporate leaves of absence for symptoms resulting from a serious health condition.

For example, under 29 C.F.R. § 825.114, "[a]n employee who is pregnant may be unable to report to work because of severe morning sickness." Under Metro's argument, the employee would have had to have the requisite number of visits to a health care provider for the *morning sickness* in order to qualify for intermittent leave due to that symptom of the pregnancy. Clearly, this is not the case. *See* 29 C.F.R. § 825.114. As the regulations make clear, under the FMLA, the focus is on the effect of a particular medical condition, as opposed to the diagnosis itself.

As explained above, Mauder's diabetes causes him to have symptoms of severe diarrhea, which renders him periodically unable to perform the essential functions of his job. Accordingly, Mauder presented sufficient evidence of incapacity under the FMLA and applicable regulations.

Question 2:

Whether an employer must allow an employee fifteen days to return the FMLA certification packet upon a request for intermittent FMLA leave in accordance with 29 C.F.R. § 305.

"In determining whether an employee's leave request qualifies for FMLA protection, the employer must assess whether the request is based on a 'serious health condition,' and, for that purpose, may request supporting medical documentation." *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973 (5th Cir. 1998).

Indeed, the Fifth Circuit acknowledged in this case that "the FMLA also protects the employer by providing that "[a]n employer may require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee." 446 F.3d at 582. However, in the event that the employer requests supporting medical certification, it must allow the employee at least fifteen days to return the documents requested by the employer. 29 C.F.R. § 825.305(b).

In this case, the Fifth Circuit misconstrued the applicable regulation, which allows the employee fifteen days to return the requested documents. Specifically, the Fifth Circuit held that "Mauder, however, did not provide the medical certification requested by Metro." 446 F.3d at 582. In its discussion, however, the Fifth Circuit addressed communications between Mauder and Metro relating to his medical condition that occurred ***prior to*** his request for intermittent leave under the FMLA, and, of course, ***prior to*** Metro's request for the medical certification packet from Mauder. Nevertheless, the Fifth Circuit held that during the discussions Mauder had with Metro prior to his request for FMLA leave, Mauder failed to provide adequate medical information to support a request for leave under the FMLA. What the Fifth Circuit overlooks is that prior to Mauder's formal FMLA request on October 4, Mauder had no discussions with Metro about the FMLA, and was never asked to complete an FMLA certification packet. Rather, during the time of the discussions referenced by the Fifth Circuit, Mauder was only considering his rights under the Americans with Disabilities Act. App. B, p. 27a.

After Mauder learned that he may have rights under the FMLA, he specifically requested intermittent leave under the FMLA on October 4, 2002. In response, the same day,

Metro, for the first time, provided Mauder with the medical certification form, and indicated to him that he had 15 days in which to return it (as it was required to do under 29 C.F.R. § 825.305), until October 19.

This request by Mauder, and the subsequent request by Metro to have the medical certification packet completed, triggered the regulation allowing the employee 15 days to complete and return the packet. However, Mauder was not given fifteen days to return the documents following Metro's request. According to Metro, it was free to terminate Mauder at any time prior to the expiration of the 15-day period since it had already begun the disciplinary process, despite the fact that Metro was clearly on notice of a potential FMLA issue. Prior to the expiration of the fifteen days, on October 11, Metro terminated Mauder, blatantly interfering with his ability to obtain FMLA protection. The Fifth Circuit misinterpreted this aspect of the FMLA protection afforded to employees.

The decisions of both the district court and the Fifth Circuit focus on the fact that Metro had placed Mauder on a thirty-day corrective action plan, and terminated him at the end of the thirty-day period. Clearly, however, when Mauder specifically requested intermittent FMLA leave ***prior to*** the end of his corrective action period and simultaneous termination, Metro was placed on notice that the issues giving rise to Mauder's probation may involve FMLA protection. Certainly, at that point, Metro had a duty to defer the planned termination until at the earliest, the following week–after it received the completed medical certification from Mauder that it had requested.

There is factual a sufficiency issue worthy of this Court's review.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph Y. Ahmad
Counsel of Record
Ahmad, Zavitsanos & Anaipakos, P.C.
3460 One Houston Center
1221 McKinney Street
Houston, Texas 77010-2009
Telephone: 713/ 655-1101
Telecopier: 713/ 655-0062

July 13, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20299

[Filed April 14, 2006]

KENNETH A. MAUDER,
Plaintiff-Appellant,

v.

METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEXAS, also known as Metro,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
Civil Action No. H-03-0145
Melinda Harmon, United States District Judge

Before HIGGINBOTHAM, DAVIS, and STEWART, Circuit Judges.

OPINION

CARL E. STEWART, Circuit Judge:

Appellant Kenneth Mauder ("Mauder") appeals from the district court's grant of summary judgment in favor of the defendant-appellee Metropolitan Transit Authority of Harris County, Texas ("Metro"). Mauder states that the district court erred in its grant of summary judgment because (1) he presented sufficient evidence that he suffers from a serious health condition, and, therefore should have been granted temporary leave under the Family and Medical Leave Act ("FMLA") to take necessary bathroom breaks; and (2) Metro's termination of his employment was done in retaliation to his exercise of his FMLA rights. For the following reasons, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Mauder was an employee of Metro, the operator of the public transportation system for Harris County, Texas, from June 1999 through October 2002 as a Senior Support Center Analyst in Metro's Information Technology Support Center ("Support Center"). The function of the Support Center is to answer telephone calls from internal Metro customers relating to computer problems; Mauder's job duties mainly included providing technical support via telephone, resolving internal customers' technology problems, and assisting others in the IT department in training Support Center Analysts. In February 2002, a new Lead Support Center Analyst ("Supervisor Watkins") was hired and she determined that the Support Center needed improvement, as there were no accountability or customer service standards in place. She also determined that Mauder was "often away from his desk and unavailable

to answer customer service calls." Therefore, she sent an e-mail to him explaining that he needed to be more visible. She later instituted specific procedures, scheduled break times, and established attendance policies to make the Support Center more productive.

In March 2000, Mauder missed two weeks of work; he was receiving medical treatment for boils caused by ingrown hairs. Through tests administered during his treatment, Mauder discovered he had Type II diabetes. Mauder returned to work on April 1, 2002, but his return to work notice made no mention of any medical restrictions, though his doctor advised him to change his diet and stop smoking. In mid-April, Mauder's doctor prescribed Metaformin, a generic version of the insulin drug Glucophage, which has a side-effect of temporary uncontrollable bowel movements and diarrhea. Metaformin was prescribed to treat Mauder's diabetes. Mauder, however, explained that he did not experience the side-effects of Metaformin until May or June, at which time Mauder told his doctor because he "thought [his doctor] would like to know." In his brief, Mauder stated that coping with the medication's side-effects "required approximately 15 minutes in the restroom [at a time]. . . . As a result, Mauder was medically required to leave his work station for restroom breaks at unscheduled times."

After the aforementioned procedures, scheduled break periods, attendance policies, etc.,[1] were implemented at the

---

[1] Supervisor Watkins also implemented the industry standard for two measurements of the Support Center analysts' productivity: "total available time" and "not ready mode." "Total available time" refers to the total time that an analyst is available to answer customer service calls. "Not ready mode" refers to times when an analyst is not available to answer customer service calls. The

Support Center in May, Supervisor Watkins noticed that Mauder was not adhering to these rules. According to Mauder, his break time was from 9:00 a.m.-9:15 a.m. and 2:00 p.m.-2:15 p.m. and "he could not always [defer his trips to the bathroom] until the scheduled break time." Supervisor Watkins, unaware of Mauder's medical condition, sent an email to him reminding him of the necessity of following such procedures as logging off his computer when he left his desk. Thereafter, she sent another e-mail to Mauder concerning his tardiness in returning from scheduled breaks and mentioning three specific occasions of tardiness. Mauder responded to the first email by sending an email back to Supervisor Watkins stating sarcastically, "no problem. I'll log out even if I back up in my chair"; and he responded to Supervisor Watkins's second email by giving her a handwritten doctor's note which stated that a side-effect of his diabetes medication was diarrhea, but that his condition should improve. Mauder concedes in his brief that he was frequently late, but explains that he told Supervisor Watkins that his medication made him experience severe diarrhea.

Despite the inconvenient side-effects of the medication, Mauder states that his doctor concluded that he should continue taking Metaformin. Mauder says that he explained his special circumstances to Supervisor Watkins and that he requested a flexible break schedule. According to Mauder, Metro refused the request and instructed him to take his breaks at the scheduled times.

On June 6, 2002, Mauder sent Supervisor Watkins an

---

industry standard for total available time is 37 hours per 40 hour week and the industry standard for not ready mode is 5 minutes per call or 30 minutes per day. During the time period of the events encompassing this appeal, Mauder never satisfied these time guidelines.

email with the subject line "We're losing the 3 Tardy's." He requested that the three instances of tardiness be removed from his record, based on the aforementioned doctor's note. Supervisor Watkins met with Mauder the next day and upon asking Mauder to provide more information regarding his medical condition, Mauder refused and instead stated in a follow-up email that he and his doctor had provided enough information and he would not provide any additional information. Supervisor Watkins denied Mauder's demand that the three incidents of tardiness be removed from his record and that he be allowed flexible break times.

After this incident, Mauder was warned repeatedly regarding his tardiness, both verbally and in written reprimands. He also received his 2002 performance appraisal on June 19, 2002, which noted that "on several occasions especially during peak times [Mauder] has been away from the Support Center." His overall rating of the appraisal was "satisfies most";[2] therefore, Mauder rationalizes that his performance did not suffer even though he took longer breaks. The performance appraisal also noted Mauder's tardiness and unavailability. Less than two weeks later, when his performance did not improve, Supervisor Watkins issued a documented verbal warning to him for repeated tardiness. In August, she issued a written reprimand to Mauder because of his tardiness. Mauder argues that because of the written reprimand in August, he had his doctor write Supervisor Watkins a final note explaining that his diarrhea may indeed be a permanent side effect of taking Metaformin. Contrary to this assertion, the record reveals that this five-line doctor's

---

[2] On Metro's 4-part ratings scale, "satisfies most" is the second lowest rating. The record reflects that Mauder testified that he considered this rating equivalent to a "C minus."

note did not take such a position. In fact, in it the doctor explains that "usually the side effects are transient, but not always. I will try to manage the side effects on his next office visit." Supervisor Watkins, according to Mauder, again refused his request for flexible restroom breaks.

Finally, on September 12, 2002, Supervisor Watkins issued a memo indicating that Mauder, because of his unavailability during the work day, would be placed on a one-month corrective action plan effective the next day. This memo also indicated what areas in Mauder's work performance needed improvement; specifically, the memo noted that Mauder needed to increase his work area visibility and improve his negative attitude. Mauder asserts that he was "placed on probation for issues concerning not ready mode and total available time" and "Metro placed him on probation for this conduct with no previous warning and threatened him with termination," which is contrary to "Metro's own progressive disciplinary policy." The record [*579] reflects, however, that Supervisor Watkins had issued several previous warnings to Mauder. Furthermore, upon instituting Mauder's probation, she explained to Mauder that the corrective action period would end on October 11, 2002, and that if he did not adhere to the established guidelines during the probationary period, he would be terminated.

On September 25, 2002, Supervisor Watkins issued a memo concerning Mauder's progress during the corrective action period, noting that Mauder had not improved in any of the areas identified in the corrective action plan. A similar record was logged on October 1, 2002, and October 8, 2002. On October 4, 2002, Mauder made his only FMLA leave request to Metro's Human Resources Department ("HR"); in response, HR mailed a FMLA packet to Mauder and explained that Mauder was to return the packet by October

19, 2002. Just one week later, on October 11, 2002, however, Mauder was terminated from his position at Metro. Mauder asserts that his termination was a direct result of his FMLA claim with HR and that he believed, based on his conversation with HR, that his probation would likewise be extended until the packet's due date of return passed.

On January 13, 2003, Mauder filed this lawsuit against Metro, asserting claims for violations of the American With Disabilities Act ("ADA") and the FMLA. On June 22, 2004, Metro filed a motion for summary judgment and, in his response to the motion, Mauder expressly abandoned his ADA claims. On March 28, 2004, the district court granted Metro's motion for summary judgment, stating that Mauder "repeatedly admitted that he did not meet the hour standards during the corrective action period, and he offers no argument or evidence why this legitimate, nondiscriminatory reason for terminating him was a pretext for discrimination." From the grant of the motion, Mauder appeals contending that the district court erroneously concluded that he failed to produce sufficient evidence of a serious health condition under the FMLA and failed to produce sufficient evidence of retaliation by Metro.

II. DISCUSSION

A. Standard of Review

The standard of review for a district court's grant of summary judgment is de novo. *Facility Ins. Corp. v. Employers Ins. of Wausau*, 357 F.3d 508, 512 (5th Cir. 2004) (citing *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 507 (5th Cir. 2003)). Summary judgment is only appropriate if the evidence shows that there is no genuine issue as to any material fact, and that the moving party is entitled to

judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c).

B. Overview

The FMLA provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following . . . . (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612 (a)(1)(D) (2002). A "Serious Health Condition," defined under the FMLA at 29 C.F.R. § 825.114 (a), is an illness, injury, impairment or physical condition that involves 1) inpatient care or 2) continuing treatment by a health care provider. The regulation refers to diabetes as an example of a chronic serious health condition that may cause episodic rather than a continuing period of incapacity; therefore, we consider diabetes a serious health condition. 29 C.F.R. § 825.114(a)(2)(iii)(C) (2006).

Mauder asserts that he suffers from a "serious health condition involving continuing treatment by a healthcare provider." According to the FMLA, this includes 1) a period of incapacity of more than three consecutive days; 2) any period of incapacity due to pregnancy or prenatal care; or 3) any period of incapacity or treatment for such incapacity due to a chronic serious health condition." 29 C.F.R. § 825.114(a)(2) (2000). Furthermore, under 29 C.F.R. § 825.114(a)(2)(i), "incapacity" is an inability to work due to the serious health condition, treatment therefore, or recovery therefrom. 29 C.F.R. § 825.114(a)(2)(i) (2006).

We have previously explained that the FMLA contains two distinct provisions. *Nero v. Indus. Molding Corp.*, 167 F.3d 921, 927 (5th Cir. 1999) (citing *Bocalbos v. Nat'l W. Life Ins. Co.*, 162 F.3d 379, 383 (5th Cir. 1998); *Hodgens v. Gen.*

Dynamics Corp., 144 F.3d 151, 159-60 (1st Cir. 1998)); *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997)). The first provision of the FMLA creates a series of entitlements or substantive rights. An employee's right to return to the same position after a qualified absence falls under this category. *Nero*, 167 F.3d at 927 (citing *Bocalbos*, 162 F.3d at 383). An employer must honor entitlements, and cannot defend by arguing that it treated all employees identically. *Nero*, 167 F.3d at 927 (citing *Diaz*, 131 F.3d at 712). "Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer." *Nero*, 167 F.3d at 927 (citing *Hodgens*, 144 F.3d at 159).

The second provision of the FMLA is proscriptive, and protects employees from retaliation or discrimination for exercising their rights under the FMLA. *Nero*, 167 F.3d at 927; *see also* 29 C.F.R. § 825.220(c) (1997) ("An employer is prohibited from discriminating against employees . . . who have used FMLA leave."). In order to establish a prima facie case for a FMLA retaliatory violation, the employee must show the following elements: 1) he is protected under the FMLA; 2) he sought to return to work before the FMLA leave expired; and 3) the employer failed to reinstate him to the position, or an equivalent position." 29 U.S.C. § 2614(a)(1) (2000). The first issue in Mauder's appeal deals with the entitlement provision; the second issue in his appeal deals with the proscriptive provision.

B. Mauder's First Claim: The FMLA Entitlement Provision

In his first issue on appeal, Mauder asserts that he should have been given temporary leave under the FMLA to go to the restroom because of his persistent diarrhea. Unlike other

FMLA claims we have considered, Mauder is not asking for an excused absence; he is asking for unfettered permission, while at work, to take necessary restroom breaks. We are unable to locate a case where "temporary" FMLA leave was awarded in such a context-where the leave given does not constitute time away from a place of work, but merely periodic time away from a desk throughout the work day. Despite the novelty of Mauder's FMLA claim, a careful review of the entire record allows us to resolve the key issues presented to us on appeal.

The parties disagree as to whether the underlying cause of Mauder's need for unrestricted bathroom breaks is diabetes or diarrhea. Mauder contends that he requests leave because of his diabetes and that the diarrhea was nothing more than a side-effect of this disease. Metro states that diarrhea is the underlying cause. Nonetheless, even though the record reflects that Mauder's diabetes was under control, that Mauder himself stated that Metaformin successfully regulated his blood sugar level and that Mauder's need for frequent bathroom breaks was because of his diarrhea, the resolution of this debate is not essential to our disposition of the FMLA claim at issue. Based on the facts of this case, even assuming arguendo that Mauder has satisfied the requirements for a "serious medical condition" for either diarrhea or diabetes under the FMLA, the record reflects that he has not shown that this serious medical condition left him incapacitated, as required by the statute. Cases granting FMLA leave to an employee with severe diarrhea involve situations where the medical condition is so debilitating that the employee cannot physically go to work. *Electrolux Home Prod. v. United Auto. Aerospace & Agr. Implement*, 416 F.3d 848, 851 (8th Cir. 2005) ("On a June 2002 leave form, a physician described her illness as 'Abd. Pah, Diarrhea.' On each of these occasions she missed more than three consecutive days of work: three

days of work in 2001, five days in April 2002, and three days in June 2002."); *Banks v. CBOCS West, Inc.*, 2005 U.S. Dist. LEXIS 27861, 2005 WL 1126913, *1 (N.D. Ill. 2005) (unpublished) ("On March 14, 2000, Banks was suffering from so much pain, diarrhea and weight loss that he could no longer work."); *Myers v. Bridgestone/Firestone Long-Term Disability Benefits Plan*, 2005 U.S. Dist. LEXIS 42399, 2005 WL 1240603 *1 (E.D. Tenn. 2005) (unpublished) ("Those reports indicated that due to the frequency of plaintiff's diarrhea, she was unable to work, that she needed to be near a restroom to accommodate her explosive diarrhea, and that she would need a low stress position if she were to return to work, as stress aggravated her illness."); *McClain v. Sw. Steel Co., Inc.*, 940 F. Supp. 295, 298-300 (N.D. Okla. 1996) (concluding that summary judgment was inappropriate where plaintiff attributed absenteeism to chronic nausea, diarrhea, vomiting, severe headaches, dizziness and/or lightheadedness as symptoms might constitute a serious health problem). Furthermore, as we have previously explained, the FMLA recognizes diabetes as an example of a chronic serious health condition that may cause episodic rather than a continuing period of incapacity. 29 C.F.R. § 825.114(a)(2)(iii)(C) (2006). In Mauder's case, however, he did not experience either episodic or continuing incapacity.

Accordingly, we find that Mauder has not shown that he was incapacitated or that his condition prevented him from going to work. 29 C.F.R. § 825.114(a)(2)(i) (2006) (explaining that the statute applies when one is unable to work due to a serious health condition, treatment therefore, or recovery therefrom). He does not meet the requirements of 29 C.F.R. § 825.114(a)(2) - the regulation defining a "serious health condition involving continuing treatment by a healthcare provider" for purposes of FMLA leave. First, he was not absent from work for the "more than three

consecutive days"; the record reflects that Mauder was never absent from work or unable to go to work because of either his diabetes or his diarrhea. Second, he obviously was not incapacitated due to pregnancy or prenatal care. Finally, he was not incapacitated and did not receive treatment for such incapacity due to a chronic serious health condition. Apparently, because he was not incapacitated or unable to attend work, he did not seek treatment for either his diarrhea or his diabetes beyond the initial diagnosis of his diabetes in April and subsequent routine check-ups. Nothing in the record suggests to us that either condition was a serious health condition resulting in incapacity of either an episodic or permanent nature, as defined by the FMLA or case law, preventing Mauder from being physically present at the Support Center. Therefore, because Mauder has not proven that his medical condition left him incapacitated even temporarily, we hold that the district court did not err in determining that Mauder was not entitled to FMLA leave. 29 C.F.R. § 825.114(a)(2)

Furthermore, notwithstanding our discussion of whether leave under the FMLA is even available considering Mauder's condition, the record is clear that Metro should also not be held accountable for not providing Mauder with FMLA leave because Mauder did not provide information requested by Metro that was needed to process Mauder's demands for flexible bathroom breaks. Metro sought more information from Mauder regarding his medical condition and his request for unrestricted bathroom breaks, but in response, Mauder sent an email to Supervisor Watkins on June 12, 2002, in which he stated that he and his doctor had provided "enough information" and would not provide more. Therefore, Supervisor Watkins did not move forward with Mauder's requests.

We interpret the FMLA as a statute that requires

cooperation from the employer *and* employee. After all, the ultimate underlying purpose of the FMLA is to accommodate a particular medical circumstance.[3]

In addition to allowing leave for ill employees, the FMLA also protects the employer by providing that "[a]n employer may require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee." *Id.* § 2613(a). Such a medical certification will be considered sufficient if it contains certain information, including: (1) the date on which the serious health condition commenced; (2) the probable duration of the condition; (3) the appropriate medical facts within the knowledge of the health care provider regarding the condition; and (4) if the leave is for the employee's own serious health condition, a statement that the employee is unable to perform the functions of his or her job. 29 U.S.C. § 2613(b) (2000). Mauder, however, did not provide the medical certification requested by Metro. In addition to his bathroom requests, Mauder sent an email to Metro stating that documentation of three tardies should be removed from his record because of his medical condition. Metro had only recently learned of Mauder's condition and responded by asking for additional medical information - a response, as explained above, explicitly allowed under the statute. In turn, Mauder, however, refused to comply with Metro's request. Therefore, Metro explained that the "three tardies" would not be removed and it continued to deny Mauder's repeated requests for temporary leave. These actions are well within Metro's rights under the

---

[3] The FMLA was enacted in 1993, as a way to provide job security and reasonable leave for employees with "serious health conditions that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4) (1999).

FMLA as an employer. Mauder cannot complain that he was denied leave when he was previously unwilling to work with his employer to effectuate this leave.

Therefore, because Mauder's illness did not render him incapacitated or absent from work, his medical condition does not fall within the FMLA definition of a serious health condition. Mauder's failure to provide his employer with requested information to effectuate the leave he asked for in the first place is a sufficient reason for us to hold that the district court did not err in granting summary judgment in favor of Metro on this issue. Mauder was not entitled to leave under the FMLA.

C. Mauder's Second Claim: The FMLA Proscriptive Provision

As we explained, Mauder has not established a prima facie case of deprivation under the FMLA because he has presented no evidence that he was incapacitated. For purposes of this claim, however, we will assume arguendo that he has, as there is compelling evidence independent of the first prong that Mauder's claim for retaliation fails.

In order to establish a prima facie case of retaliation under the FMLA, the employee must show the following: 1) he was protected under the FMLA; 2) he suffered an adverse employment action; and 3) he was treated less favorably than an employee who had not requested leave under the FMLA or the adverse decision was made because he sought protection under the FMLA. *Hunt v. Rapides Healthcare Sys.*, 277 F.3d 757, 768 (5th Cir. 2001). Once the complaining party establishes a prima facie case of deprivation of a substantive right to reinstatement under the FMLA, the burden shifts to the defendant to prove that the plaintiff would have been

terminated during the FMLA leave period and is therefore not entitled to restoration of his position. 29 C.F.R. § 825.216(a) (2006). Thereafter, the burden shifts back to the plaintiff to show by a preponderance of the evidence that the reasoning presented by the defendant is a pretext for retaliation. *Hunt*, 277 F.3d at 768.

When evaluating whether the adverse employment action was causally related to the FMLA protection, the court shall consider the "temporal proximity" between the FMLA leave, and the termination. *Wilson v. Lemington Home for the Aged*, 159 F. Supp. 2d 186, 195-96 (W.D. Pa. 2001) (explaining that a causal connection existed between the FMLA leave and the termination when the plaintiff was terminated while on FMLA leave and reasoning that the close proximity in time between FMLA leave and the adverse action establishes the necessary causal connection). Moreover, the plaintiff does not have to show that the protected activity is the only cause of her termination. *Long v. Eastfield Coll.*, 88 F.3d 300 n.4 (5th Cir. 1996) (holding that the plaintiff was not required to show that the protected activity was the "sole factor" motivating adverse employment action). The plaintiff is, however, required to show that the protected activity and the adverse employment action are not completely unrelated. *Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001).

In its brief, Metro points out that there is not a sufficient causal link between Mauder's employment termination and his filing for FMLA leave. It explains that Mauder filed for FMLA leave after three weeks of his one-month probationary program. Further, the record reflects that Mauder was aware that if he did not improve his productivity and attitude, he could be removed from his position. Metro also explains that it presented legitimate, nondiscriminatory reasons for Mauder's discharge. These reasons are documented in the

record through corrective action memos as well as verbal and written reprimands. Each instance points to the fact that Mauder was discharged for failing to work in harmony with Metro's time and productivity requirements.

The district court relied on *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), in holding that Mauder did not meet the requirements provided by the FMLA to prove a case of retaliation. *Reeves* is instructive in our analysis of this issue: "if the plaintiff created only a weak inference of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred" a court should not find the plaintiff has successfully proven retaliation. Such is the case for Mauder. His explanations are conclusory and he has produced no evidence in the record that he was discharged because he requested FMLA leave. Metro, on the other hand, has stated that Mauder was discharged (after a corrective action probationary period) because of his failure to perform his work in an efficient and timely manner, specifically, because of his excessive tardiness. In fact, when Mauder requested FMLA leave, he had already been on corrective action approximately three weeks and even admitted in his deposition that he knew he could be discharged if he failed to improve his performance by the October 11, 2002, deadline imposed by Supervisor Watkins.

Furthermore, *Clark County School District v. Breeden*, 532 U.S. 268, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001), provides insight into Mauder's contention that his termination eight days before the time allotted to file his FMLA leave application expired is evidence of retaliatory action on Metro's part. In *Clark County*, the plaintiff alleged that she had been transferred to a different position in retaliation for

filing a Title VII action. *Id.* at 271. The evidence showed that the plaintiff filed her lawsuit on April 1, 1997, and on April 10, 1997, the plaintiff's supervisor mentioned to the president of the teacher's union to which the plaintiff belonged that she was considering transferring the plaintiff. *Id.* at 271-72. The job transfer, however, actually occurred in May. In the lawsuit, the employer filed a motion for summary judgment arguing that there was no causal connection between the filing of the plaintiff's lawsuit and the transfer; the plaintiff, however, relied on the close temporal proximity of the two events. *Id.* at 272. The district court granted the employer's motion for summary judgment because it was not served with the lawsuit until April 11, 1997, after the supervisor has already made the remark to the union president, and the supervisor testified that she did not learn of the lawsuit until after April 11, 1997. *Id.* Thus, the district court found no causal connection to make the transfer rise to the level of retaliatory. *Id.* The Ninth Circuit reversed, holding that the actual transfer occurred a month after the supervisor learned of the plaintiff's lawsuit. *Id.* at 272-73. The Supreme Court, however, agreed with the district court, and held that because the supervisor was contemplating the transfer before she learned of the suit, the supervisor was not required to suspend the transfer proceedings just because the employee filed the lawsuit. *Id.* at 273-74.

The facts in *Clark County* are somewhat analogous to the facts in Mauder's appeal. Mauder did not make his request for FMLA leave until October 4, 2002; however, Mauder was notified in his initial corrective action memo, which he received from Supervisor Watkins on September 12, 2002, the day he was placed on probation, that the corrective action period would end on October 11, 2002, and, if his productivity and attitude did not improve, Metro would terminate his employment. Mauder's deposition shows that he

was aware that if his performance did not improve by the deadline, he could be terminated. Furthermore, prior to being placed on corrective action, Mauder received a handful of reprimands from Metro regarding his attitude and availability. When his performance and attitude did not improve, he was terminated on October 11, 2002. His termination should not and did not take him by surprise.

Accordingly, just as in *Clark County*, Metro was not required to suspend Mauder's termination pending his FMLA filing. Mauder has not successfully put the ball back in Metro's court; he has not met his burden of proof on this issue, and he does not raise an issue of fact as to whether Metro's reasons for his termination are a mere pretext for his supposed retaliatory discharge. Ultimately, we hold that this case lacks the requisite temporal proximity or substantive evidence to support a finding of retaliation by Metro.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court, finding that Mauder has failed to satisfy the requisite elements for both the entitlement and proscriptive provisions of the FMLA.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-03-0145

[Filed March 28, 2005]

KENNETH A. MAUDER	)
Plaintiff,	)
	)
v.	)
	)
METROPOLITAN TRANSIT	)
AUTHORITY OF HARRIS COUNTY,	)
TEXAS a/k/a METRO	)
Defendant.	)
	)

ORDER

Pending before the court is the Motion for Summary Judgment (Doc. 22) of the Defendant, Metropolitan Transit Authority of Harris County, Texas, a/k/a Metro ("Metro"). In his First Amended Complaint (Doc. 5), Plaintiff, Kenneth Mauder ("Mauder") asserted claims for disability discrimination and retaliation pursuant to the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101, *et. seq.*, the Texas Commission on Human Rights Act ("TCHRA"), Tex.

Lab. Code § 21.001, *et. seq.*, and claims for alleged violation fo the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 26.01, *et. seq.* In a footnote on the first page of Mauder's "Response" to Metro's Motion for Summary Judgment, Plaintiff states: "[I]n this Response, Plaintiff addresses only his claims brought pursuant to the Family and Medical Leave Act, and voluntarily withdraws his claims under the Americans with Disabilities Act." (Doc. 26, p. 1 n. 1.) Therefore, the court limits its analysis of Metro's Motion for Summary Judgment solely to whether Mauder's claims survive under the FMLA.

I. Background

A. Legal Standard - Summary Judgment

The movant seeking summary judgment must inform the court of the basis of his motion and point out those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). If the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant asserting an affirmative defense, he must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in his favor. *Fontenot v. Upjohn,* 780 F.2d 1190, 1194 (5th Cir. 1986). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material; i.e., only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby,* 477 U.S. 248, 256-57 (1986). The movant

need not negate the opposing party's claims nor produce evidence showing the absence of a genuine issue of fact, but may rely on the absence of evidence to support essential elements of the opposing party's claims. *Celotex,* 477 U.S. at 323-25. However, "[o]n summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). If it is evident that the party seeking summary judgment against one who bears the proof burden has no access to evidence of disproof, and ample time has been allowed for discovery, he should be permitted to rely upon the complete absence of proof of an essential element. *Fontenot v. Upjohn,* 780 F.2d at 1195. If the moving party fails to meet its initial burden, the motion must be denied, regardless of the non-movant's response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

If the movant meets his burden, the burden then shifts to the non-movant to set forth specific facts and competent summary judgment evidence to raise a genuine issue of material fact on each essential element of any claim on which he bears the burden of proof at trial. Fed. R.Civ. P. 56(c). The non-moving party may not rest on mere allegations or denials in its pleadings, but must produce affirmative evidence, and specific facts showing that there is a genuine issue for trial. Fed. R.Civ. P. 56(e); *Anderson,* 477 U.S. at 256-57. The non-movant may point to evidentiary documents already in the record that set out specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990). Furthermore, the non-movant does not likewise have to present its own evidence, but may point out genuine issues of fact extant in the summary judgment evidence produced by

the movant, if any. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198-200 (5th Cir. 1988).

"The mere existence of a 'scintilla' of evidence in support of the [non-movant's] position will be insufficient, there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson,* 477 U.S. at 252. Furthermore, when the moving party has carried its burden under Rule 56(c), his opponent will not meet its burden by merely showing that there is "some metaphysical doubt as to the material facts," *Matsushita,* 475 U.S. at 586, by "conclusory allegations," *Lujan v. Nat'l Wildlife Fed,* 497 U.S. 871, 888 (1990), by "unsubstantiated assertions," *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994), or by only a "scintilla" of evidence, *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994). *Liquid Air,* 37 F.3d at 1075. The court does not, however, *"in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts." Id.* (citing *Lujan,* 497 U.S. at 888 (resolving actual disputes of material fact in favor of nonmoving party "is a world apart from 'assuming' that general averments embrace the 'specific facts' needed to sustain the complaint.... It will not do to 'presume' the missing facts because without them the affidavits would not establish the injury that they generally allege")); *See also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 913 (5th Cir. 1992) (because non-movant bore the burden of proof on the issue of 'adequacy,' movant was not required to show that warning was *not* inadequate, but can point to the absence of evidence.) Even if evidence exists in the record, the court is not required to search for it. Rather, the non-movant *must refer* to such evidence. *Skotak,* 953 F.2d at 915 & n. 7 *(emphasis added).*

Unsubstantiated and subjective beliefs and conclusory allegations and opinions are not competent summary judgment

evidence. *Grimes v. Texas Dept. of Mental Health and Mental Retardation,* 102 F.3d 137, 139-40 (5th Cir. 1986); *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir.), *cert. denied,* 513 U.S. 871 (1994); *Topalian v. Ehrman,* 954 F.2d 1125, 1131 (5th Cir.), *cert. denied,* 506 U.S. 825 (1992). The non-movant cannot discharge its burden by offering vague allegations and legal conclusions. *Lujan,* 497 U.S. at 889.

B. Factual Background

Plaintiff was employed by Metro from June, 1999, though October 11, 2002, as a Senior Support Center Analyst in Metro's Information Technology (IT) Support Center. (Doc. 22, Mauder Depo., Exh. 1, p. 51 and Depo. Exh. 1.) As a Senior Support Center Analyst, Plaintiff had the highest title of the four analysts in the Support Center, was salary exempt as opposed to an hourly employee; and, while his job duties generally included providing technical support via telephone for resolving internal customers technology problems, as a *Senior Analyst* Mauder's experience, customer service, and troubleshooting skills were meant to be greater or higher than the other Analysts in the office. (Doc. 22, Vel Watkins Deposition, pp. 13-15, 24, 59) (emphasis added).

In February, 2002, Ms Vel Watkins ("Watkins") was hired as Lead Support Center Analyst and placed in charge of the Support Center. *(Id.,* Watkins Depo., Exh. 2, pp. 12-13.) When Watkins arrived, she noted that operations at the Support Center needed improvement (*Id.* at p 51.) In her valuation she found there were no accountability or customer service standards. (*Id.* at 52.) She stated, "there were no reporting tools or standards in place or any measurements or accountability on the part of the Support Center itself to the customers." *(Id.* at p. 54.) She concluded that calls were not being answered efficiently or adequately because there was no

troubleshooting done on the calls but they were "escalated all the time," i.e., being transferred to the next group, namely desktop support. (*Id.* at 54-55.) She attributed this problem to lack of standards and accountability. (*Id.* at p. 56-57.)

While Watkins found Mauder "qualified" as a *Senior* Analyst, she questioned his "availability," i.e., his being available to answer calls that were coming in; Mauder was often not at his desk. (Doc. 22, Vel Watkins Deposition, pp. 59-60.) Metro uses the terms "total available time" to denote the total amount of time you are available to answer calls; "ready mode" refers to the total time you are at your desk answering calls, ready and sitting there; and, an Analyst enters "not ready mode" by hitting a button, typically after taking a call and completing a resolution, and this term means that one is not ready and cannot take a call. (*Id.* at 40-41, 50.) At the end of each week, the analysts in the support center were given a calculation of their "not ready mode" time and their "total available time" - the latter being a function of your total available time minus "log in/log-out" times and "not ready mode" times. (*Id.* at 44.)

In March 2002, Mauder left work for two weeks to receive treatment for boils caused by ingrown hairs, during which time, Mauder's doctors learned from his blood test that he had Type II diabetes. (Doc. 22, Mauder Depo., Exh. 1, pp. 59-60.) At that time, when Mauder first took his medical leave, he had not known of his diabetes. (*Id.* at 60.) When Mauder returned to work on April 1, 2002, his return to work notice, dated March 25, 2002, noted no medical restrictions. (*Id.* at 72-73, Depo. Exh. 4.) Subsequently, sometime in April 2002, Mauder's physician, Dr. Reeves, prescribed Metformin for his diabetes, a drug which Dr. Reeves warned might cause "temporary" diarrhea. (*Id.* at 78-80, 84.) Mauder has described Metformin's side effect as bowel movements

characterized as "incredible diarrhea," diarrhea being defined by Mauder as a bowel movement with no solidity, which he has between three and five times a day. (*Id.* at 74, 76, 78, 84.) The last time Mauder told his physician he was "still" experiencing diarrhea and that such effect of his medication was not "temporary" occurred in June of 2003, at which point Mauder was also asked if he wanted to change medication, but chose to not do so; Mauder testified that Metformin keeps his blood sugar level in "perfect check." (*Id.* 81-82.)

At the time of his deposition, Mauder asserted he has consistently had diarrhea for over two years, from the time he started taking Metformin in April 2002, up to February 2004. (*Id.* at 76-77.) Throughout the time has was working at Metro, however, Mauder stated that his diarrhea never caused him to miss a full day of work, Mauder never experienced dehydration, he never had any bowel movement related "accidents" at work, never sought treatment for the diarrhea, was never hospitalized for the diarrhea, and was never given medication by his physician for diarrhea except for the suggestion of Immodium AD, which Mauder had tried to no effect. (*Id.* at 77, 78, 80, 89, 94-95, 211.)

As a result of Ms. Watkins aforementioned initial evaluation of the Support Center, she found it necessary to implement new accountability standards in order to improve customer service. (Doc. 22, Watkins Depo., Exh. 2, pp. 56-57, 61-62, 68-69.) About one month after arriving at Metro, she required that all Support Center Analysts "log out of' and "log into" the computer system when they were away from their desks on "breaks," to monitor the length of breaks and to show available times for answering calls. (*Id.* at 64.) In May 2002, She also wrote "Metro IT Support Center Attendance Provisions" for the Support Center, implementing new attendance guidelines, and new scheduled break times

such that she adopted an "industry standard" for "not ready mode" of five (5) minutes per telephone support call or 30 minutes daily, and a standard of thirty-seven (37) hours of "available time" per forty (40) hour work-week. (*Id.* at 61, 67-68, 101-102; Depo. Exh. 3, at MAU0095.) Watkins implemented the attendance policy (effective May 6, 2002), and met with all Support Center employees to explain the attendance policy, distributing the policy to the employees. (Doc. 22, Watkins Depo., Exh. 2, pp. 61, 67-69; Mauder Depo. Exh. 1, pp. 93-95.) Although Mauder was allegedly experiencing diarrhea by that time, he did not indicate to Watkins that he would have any difficulty following the attendance policy. (Doc. 22, Mauder Depo., Exh. 1, p. 94.)

After implementation of the aforementioned policies, Watkins noticed Mauder was violating the standards, failing to follow the log in/log out rule, spending excessive time in not ready mode, having insufficient total "available time," and even displaying an insubordinate attitude toward Ms. Watkins. (Watkins Depo. at 103-04.) On May 6, 2002, Watkins sent Mauder an email noting that his "not ready mode" time for the previous week was ten (10) hours and forty-seven minutes (47) (above the 2.5 hour per week standard.) (Doc. 22, Mauder Depo. Exh. 1, p. 103; Depo. Exh. 9.) On May 23, 2002, Watkins sent Mauder an e-mail reminding him that he was required to log out when he was away from his desk. (*Id.* at pp. 110-112; Depo. Exh. 12.)

On May 28, 2002, Watkins sent Mauder an email noting that he had returned from breaks late on 3 occasions and warning him that 5 instances would result in a documented verbal warning. (*Id.* at pp. 98-99; Depo. Exh. 7.) Responding either to the warning of May 28, 2002, to an email from Watkins on June 3, 2002, or to being informed by Watkins that he needed to get a doctor's note in reference to his

medical condition, Mauder did in fact submit a handwritten statement from his doctor stating that a side effect of the medication he was taking, was diarrhea, a condition which would "soon improve," and that he needed"frequent breaks from work to go the bathroom for now." (*Id.* at pp. 114-16; Plaintiff's Depo., Exh. 13.) Mauder states this was the first note "from a doctor" that he submitted concerning his diarrhea, and the first time Mauder referenced his alleged diarrhea in communications with Metro. (*Id.* at p. 116.)

Nine days later, on June 6, 2002, Mauder sent an email, entitled "We're losing the 3 Tardy's" to Watkins and her supervisor, Felix Vara. (Doc. 22, Mauder Depo. Exh. 15.) In the email, Mauder demanded that the three instances of tardiness be removed from his record, based on the aforementioned doctor's note:

> Since I have complied with the Americans with Disabilities Act and documented my medical condition and have explained that the charges of "tardy" are directly attributable to my medical condition [sic] I fully expect the three instances of "tardy" shall be removed from my record immediately. I will not be persecuted as I fight my battle with diabetes and I will do whatever it takes to get these charges expunged from my employee record and anywhere else that they may be recorded. (Doc. 22, Doc. Exh. 15.)

On June 7, 2002, Watkins, Watkins' Supervisor Felix Vara, and HR Representative, Pamela Thomas, met with Mauder concerning his demand, and Mauder was asked to provide more specific information concerning his medical condition or a clearer note from his physician than that of May 30th, which spelled out his medical requirements, for purposes of determining if he fit within a benefit. (Doc. 22, Mauder

Depo. Exh. 16, Vara Depo., Exh. 4, pp. 46, 48; Marilynn Moore Depo., Exh. 3, pp. 62, 64-66.) Marilyn Moore specifically stated in her deposition that the handwritten note from Mauder's physician was not enough, but that additional, more specific information from the physician was necessary than words such as "more frequent breaks," including information such as whether Mauder needed breaks every hour, twice a day, for twenty minutes, or any other estimates of frequency or period that could be used to make an accommodation - details of the illness were not necessary. (Doc. 22, Moore Depo., Exh. 3, pp. 64-66.) Approximately three days later, On June 11, 2002, Mauder sent another email stating

> On 6-11-02 my doctor and I conferred and he stated that I can't get any better blood sugar numbers than what I have right now and that he sees no need to experiment with any other medications to treat my diabetes. I agree. There will be no second note from him to Metro because we have both more than fulfilled our obligations under the Americans with Disabilities Act by documenting my medical condition and revealing what medications I take. I agree. (Doc. 22, Exh. 1, p. 117; Depo. Exh. 14.)

At some point in May and June of 2002, Mauder alleges he was asked to change his medication by Metro employees Pam Thomas and Felix Vara. (Doc. 22, Mauder Depo., Exh. 1, pp. 82, 84.)

On June 19, 2002, Watkins issued Mauder a 2002 performance appraisal, wherein she provided him an overall rating of "satisfies most," apparently the second lowest ranking one could receive. (Doc. 22, Mauder Depo., p. 143, Depo. Exh. 18.) Mauder acknowledged that as stated in

Watkins' report, he had been away from the Support Center at peak times, and that he left his position when there was one other Analyst on the phone. *(Id.* at 152.)

Plaintiff's performance did not improve following receipt of his performance appraisal. Less than two weeks later (i.e., July 2, 2002), Watkins had to issue Mauder a documented verbal warning for repeated instances of tardiness. (*Id.* at 173-74; Mauder Depo. Exh. 25.) Similarly, the next month on August 9, 2002, Watkins issued Mauder a written reprimand for continued instances of tardiness. (*Id.* at 174-75; Mauder Depo. Exh. 26.)

Finally on September 13, 2002, Mauder was placed on a one-month corrective action plan. In the corrective action plan, Watkins noted that Plaintiff's average time per week in "not ready mode" averaged three (3) hours as opposed to two (2) hours and thirty (30) minutes per week. (Doc. 22, Mauder Depo. Exh. 27.) Furthermore, Watkins noted that Mauder's "total available time" needed to increase from Plaintiff's average of 31 hours per week, to the departmental standard of 37 hours per week. *(Id.)* Watkins also noted (1) that Mauder's log in/log out times had to be limited to two breaks of 15 minutes each and lunch; (2) that Mauder needed to increase his work area visibility; (3) that Mauder needed to timely complete his weekly IT rotation tasks; and (4) that Mauder needed to cease his negative, insubordinate communication. *(Id.)* Mauder was advised that the corrective action period would end on October 11, 2002, and he was advised that "[f]ailure to adhere to established guidelines during the 30 day probationary period and thereafter would result in immediate termination." *(Id.)* Mauder admitted at his deposition that he was aware of the October deadline. (Doc. 22, Mauder Depo., p. 189.)

After September 12, 2002, Watkins met weekly with Mauder during the corrective action period, and she issued memos concerning his progress (or lack thereof). (Doc. 22, Mauder Depo., p. 180; Mauder Depo. Exh's 28-30.) On September 25, 2002, Watkins wrote that during the week of September 16th - 20th, Mauder's "not ready mode" was five (5) hours and fourteen (14) minutes (more than double the two and a half hour standard), and his "available time" for that week was twenty-seven (27) hours and forty-seven (47) minutes (approximately ten hours less than the weekly standard.) (Doc. 22, Mauder Depo. Exh. 28.) Mauder admitted at his deposition that he had no reason to doubt that those hours were true. (Doc. 22, Mauder Depo., pp. 180-81.)

One week later, Watkins noted that Mauder's "not ready mode" for the week of September 23rd - 27th was three (3) hours and twenty-three (23) minutes (almost an hour above the standard), and his "available time" was twenty-five (25) hours and twenty-eight (28) minutes (more than eleven and one-half hours below the standard). (Doc. 22, Mauder Depo. Exh. 29.) Mauder has admitted this was not false and that it is objective. (Doc. 22, Mauder Depo. at 188.)

On October 8, 2002, three days before the end of the corrective action period, Watkins noted that Mauder's "not ready mode" time for September 30th - October 4th, was three (3) hours and thirty-six (36) minutes (more than one hour above standard), and that his total available time was twenty-eight (28) hours and forty-nine (49) minutes (approximately eight hours less than the standard). (Doc. 22, Mauder Depo. Exh. 30.) Plaintiff admitted there was nothing in the October 8th memorandum he believe was false. (Doc. 22, Mauder Depo., p. 189.)

Mauder was thereafter terminated pursuant to the corrective action plan, and the termination notice stated:

> After informal coaching and counseling, and written notification of performance issues, you were placed on 30-day Corrective Action (from 9/12/02 - 10/1 1/02). You have received verbal and written feedback on a weekly basis during this Corrective Action process, but your work performance regarding "Not Ready Mode" and "Available Time" to date is still not within compliance of the written guidelines. As a result of your unacceptable statistics, your employment is terminated effective today, Friday, October 11, 2002. (Doc. 22, Mauder Dcpo., Exh. 31.)

II. Analysis

The FMLA contains "two distinct provisions," the first type creating a series of "entitlements or substantive rights." *Nero v. Industrial Molding Corp.,* 167 F.3d 921, 927 (5th Cir. 1999). An employee's right to return to the same position after a qualified absence falls into this category, *Id.* In such a case, "[b]ecause the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer." *Id.* (quoting *Hodgens v. General Dynamics Corp.*, 144 F. 3d 151, 159 (1st Cir. 1998)). The "second type of provision is *proscriptive,* and protects employees from retaliation or discrimination for exercising their rights under the FMLA." *Id.* (emphasis added). In the instant action, Mauder argues that Metro violated both these *prescriptive* and *proscriptive* provisions of the FMLA. (Doc. 26, p. 9.)

Mauder has abandoned his ADA claims and instead asserts a series of FMLA-type claims which, Metro asserts,

go beyond the bounds of his original complaint. (Doc. 28, p. 2. n.3.) For example, Mauder states that "by terminating him for his needed restroom breaks, Metro failed to reinstate him to his position or an equivalent position following his protected leave under the FMLA." (Doc. 26, p. 9.) Mauder also asserts that Metro "interfered with [his] ability to exercise his rights under the FMLA" allegedly because "once Metro learned of the need to take breaks from work to go to the restroom, Metro had a duty to notify [him] that his breaks may be FMLA qualifying." (*Id.* at 9-10.) Mauder contends that Metro further "interfered with [his] ability to assert his rights under the FMLA when human resources told him that he did not have to complete and return the form until October 19, 2002, eight days after he was terminated." (*Id.* at 10.) Mauder also contends Metro had an obligation to transfer him to an alternative position instead of discharging him for failing to perform the essential functions of his position. (*Id.* at 15.) Finally, Mauder asserts Metro had "retaliated" against him for exercising his rights under the FMLA "by requesting an accommodation for his diabetes." (*Id.* at 10.)

(A) Prescriptive Rights

The FMLA requires covered employees to provide up to 12 weeks of unpaid leave to an eligible employee who suffers from "a serious health condition that makes the employee unable to perform the essential functions of the position of such employee." *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 319 (5th Cir. 1999) (quoting 29 U.S.C. § 2612(a)(1)(D)). A "serious health condition" is an illness, injury, impairment, or physical condition that involves (1) inpatient care (i.e., an overnight stay at a hospital) or (2) continuing treatment by a health care provider. 29 C.F.R. § 825.114(a). Continuing treatment by a health care provider involves (1) a period of incapacity (i.e., inability to work due

to the condition) of more than three calendar days, or (2) a period of incapacity or treatment for such incapacity due to a chronic serious health condition.

Plaintiff has alleged "incredible diarrhea" that caused him to leave his work station for frequent restroom breaks at unpredictable times, though it has never caused him to be hospitalized. (Doc. 22, Plaintiff's Depo., Exh 1, at pp. 74-76, 178-179, 211.) Plaintiff can only be entitled to FMLA protection if his diabetes or diarrhea constitutes a "serious health condition." Metro argues that Mauder's diarrhea did not constitute a "serious health condition" within the meaning of the FMLA. *See Johnson v. United States Postal Service,* No. 1:99-CV-00170, 2001 WL 882949, at *2-3 (M.D.N.C. Jun. 19, 2001) (holding that the plaintiff's testimony that she suffered from diarrhea incontinence and bronchitis was not sufficient to establish that her absences were attributable to a "serious health condition"). In particular, Metro argues that the language of the statute requiring "a serious health condition *that makes the employee unable to perform the essential functions of the position of such employee,*" (29 U.S.C. § 2612(a)(1)(D)), shows that because it was not Mauder's diabetes, but rather the resulting diarrhea from taking medication (the Metformin) to aid his diabetes, which caused him to take frequent bathroom breaks, the *diarrhea* is the only affect which can be considered a potential serious health condition as part of the FMLA analysis; however, Metro emphasizes, the diarrhea does not qualify as such.

It is evident from the undisputed facts that Mauder's diabetes/diarrhea never involved a period of inpatient care or incapacity. As Mauder points out, diabetes is nevertheless listed as a chronic serious health condition in the regulations:

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g., asthma, *diabetes*, epilepsy, etc.). 29 C.F.R. § 825.114 (emphasis added).

Though Mauder attempts to argue that he suffers from a "chronic serious heath condition," the court agrees with Metro's arguments because Mauder was never "incapacitated" as a result of his diabetes or the resulting diarrhea. 29 C.F.R. § 825.114(a)(2)(iii). True, the FMLA intends to protect those who are occasionally incapacitated by an ongoing medical problem such as asthma or diabetes. *Victorelli v. Shadyside Hosp.*, 128 F.3d 184, 190, n.7 (3rd Cir. 1997). The occasional breaks for diarrhea which Mauder's diabetes medication occasioned, however, do not even arise to the level of such incapacity. *See Henderson v. Cent. Progressive Bank,* CIVIL ACTION NO. 01-2963 SECTION "C" (4), 2002 U.S. Dist. LEXIS 17553, at *13 (E.D. La. Sept. 17, 2002)(citing cases); *See also Bond v. Abbott Lab.*, 7 F. Supp. 2d 967, 973-74 (N.D. Ohio 1998) (citing *Bauer v. Varity Dayton- Walther,* 118 F.3 d 1109,

1112 (6th Cir. 1997), for the proposition that rectal bleeding is not covered as a serious health condition)).

Furthermore, even assuming that Mauder would have had a chronic serious health condition, he did not provide the necessary information to Metro from his physician, Dr. Reeves, after Metro had requested such information to determine the frequency and length of breaks Mauder would need to take during the day. Even this line of reasoning, however, necessarily assumes that the FMLA allows for the provision of short breaks *during* the day for a person in Mauder's position, a point Mauder assumes about the FMLA without support. Mauder first specifically made an application for FMLA leave on October 4, 2002, and he requested one half hour (30 minutes) of FMLA leave per day. (Doc. 22, Mauder Depo., p. 216; Depo. Exh. 38.)

Metro points out, however, that the FMLA, unlike the ADA, "does not contain a reasonable accommodation element." *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 384 (3rd Cir. 2002); *See also Jewell v. Reid's Confectionary Co.*, 172 F. Supp. 2d 212 (D. Me. 2001). Hence the FMLA did not require Metro to facilitate Mauder's return to his station at the end of any medical leave, if his bathroom breaks could even be considered medical leave.

Mauder's argument that each bathroom break he took constituted FMLA leave and which, because he was found to have taken excessive breaks and subjected to employment action, also formed the basis for an action for non-reinstatement under the FMLA, also makes no rational sense. Mauder was never "away" from work on FMLA leave, but was only away from his desk. Even if such "away" time was considered FMLA leave, Mauder's claim would nevertheless

fail because Mauder could not perform the essential functions of his position.

> If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations maybe governed by the Americans with Disabilities Act (ADA). See § 825.702. 29 C.F.R. 825.214(b).

Therefore, Mauder's prescriptive rights were not violated.

(B) Proscriptive Rights

Plaintiff also contends that Metro discharged him in retaliation for his October 4, 2002, request for FMLA leave. The Fifth Circuit Court of Appeals has joined the other circuits in holding that the framework used in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, applies to claims that an employee was penalized for exercising his rights guaranteed by the FMLA. *Chaffin,* 179 F.3d at 392. To establish a *prima facie* case of retaliation under the FMLA, Plaintiff must show that (1) he was protected under the FMLA, (2) he suffered an adverse employment decision, and either (3a) that he was treated less favorably than an employee who had not requested FMLA leave, or (3b) the adverse decision was made because she took FMLA leave. *Hunt v. Rapides Healthcare System, LLC,* 277 F.3d 757, 768 (5th Cir. 2002); *Bocalbos v. National Western Life Ins. Co.,* 162 F.3d 379, 383 (5th Cir. 1998). If Plaintiff succeeds in making a *prima facie* case, the burden shifts to Metro to articulate a legitimate nondiscriminatory or nonretaliatory reason for the

employment action. Once Metro has done so, Plaintiff must show by a preponderance of the evidence that Metro's reason is a pretext for retaliation. *Id.* Presumably, the logic of *Reeves v. Sanderson Plumbing Products, Inc.*, applies here, such that a plaintiff's *prima facie* case, "combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. 133, 148 (2000). Such a showing will not always be adequate, for example, "if the plaintiff created only a weak inference of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*

Plaintiff cannot establish a *prima facie* case because (1) there is no evidence that he was treated less favorably than an employee who had not requested FMLA leave, and (2) there is no evidence that Plaintiff was discharged because he took FMLA leave. Rather, Metro has supplied a legitimate, non-discriminatory reason for Mauder's discharge (his failure to work according to time standards, among other issues noted about his performance), and Mauder's evidence does not raise an issue of fact regarding whether Metro's stated reasons are pretextual.

From the beginning, when Watkins had implemented new accountability standards in attendance and for breaks on May 6, 2002, Mauder was allegedly experiencing diarrhea by that time, and yet he admits he did not indicate to Watkins that he would have any difficulty following the attendance policy. (Doc. 22, Mauder Depo., Exh. 1, p. 94.) Later, when Mauder did assert his problems with diarrhea due to his diabetes medication, he stated that he would refuse to provide more information to Metro. (Doc. 22, Exh.1, p. 117, Depo. Exh. 14.) His recalcitrance did not allow Metro to develop

any approach to his condition. (Doc. 22, Moore Depo., Exh. 3, pp. 64-66.)

Furthermore, Metro has shown that Mauder underwent a "corrective action period" wherein his performance was to be monitored for 30 days from September 30, 2002, where he would have weekly meetings regarding his performance, and where he was warned that failure to improve would result in immediate termination. (Doc. 22, Mauder Depo., Exh. 1, p. 189; Depo., Exh. 30.) This is crucial because it shows that Plaintiff had already been placed on corrective action prior to the time he first specifically requested FMLA leave of 30 minutes a day, a point he describes as "the first time I mentioned FMLA specifically." (Doc. 22, Mauder Depo., p. 189, 216; Mauder Depo. Exh. 27.) Mauder had been placed on a one-month corrective action plan on September 13, 2002, approximately three weeks before his official FMLA request of October 4, 2002. (Plaintiff's Depo. Exh. 27-28.) Plaintiff was advised that the corrective action period would end on October 11, 2002, and he was advised that "[f]ailure to adhere to the established guidelines during the 30 day probationary period, and thereafter, will result in immediate termination. (Plaintiff's Depo. Exh. 27.) Plaintiff admits he knew he could be discharged if he failed to improve his performance by the October 11, 2002 deadline. (Plaintiff's Depo. at 189.) Plaintiff was thereafter repeatedly given updates of his performance and reminded of the necessity of bringing his performance up to standard. (Plaintiff's Depo., Exh's 28-30.) Plaintiff failed to do so and was discharged on October 11, 2002. (Plaintiff's Depo., Exh. 30.)

Plaintiff *repeatedly admitted* that he did not meet the hour standards during the corrective action period, and he offers no argument or evidence why this legitimate, nondiscriminatory reason for terminating him was a *pretext* for discrimination.

Furthermore, even with all the evidence taken in his favor, an inference does not arise that Metro's argument for dismissal is pretextual. Accordingly, it is hereby

ORDERED that Motion for Summary Judgment (Doc. 22) of the Defendant, Metropolitan Transit Authority of Harris County, Texas is GRANTED.

SIGNED at Houston, Texas, this 28th day of March, 2005.

/s/ _____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-03-0145

[Filed March 28, 2005]

KENNETH A. MAUDER	)
Plaintiff,	)
	)
v.	)
	)
METROPOLITAN TRANSIT	)
AUTHORITY OF HARRIS COUNTY,	)
TEXAS a/k/a METRO	)
Defendant.	)
	)

ORDER

Pursuant to its Order signed on March 28, 2005, granting the Motion for Summary Judgment (Doc. 22) of the Defendant, Metropolitan Transit Authority of Harris County, Texas, a/k/a Metro ("Metro"), the Court ORDERS that FINAL JUDGMENT IS GRANTED in favor of the Defendant, Metropolitan Transit Authority of Harris County, Texas, a/k/a Metro. The Court DENIES all further relief not otherwise granted herein. This is a FINAL JUDGMENT.

SIGNED at Houston, Texas, this 28th day of March, 2005.

/s/ _____
MELINDA HARMON
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTORY AND REGULATORY PROVISIONS INVOLVED

TITLE 29. LABOR
CHAPTER 28. FAMILY AND MEDICAL LEAVE
GENERAL REQUIREMENTS FOR LEAVE

29 U.S.C. § 2612

§ 2612. Leave requirement

(a) In general.

(1) Entitlement to leave. Subject to section 103 [29 U.S.C. § 2613], an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(2) Expiration of entitlement. The entitlement to leave under subparagraphs (A) and (B) of paragraph (1) for a birth or placement of a son or daughter shall expire at the end of

the 12-month period beginning on the date of such birth or placement.

(b) Leave taken intermittently or on a reduced leave schedule.

(1) In general. Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5) [29 U.S.C. § 2613(b)(5)], leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the total amount of leave to which the employee is entitled under subsection (a) beyond the amount of leave actually taken.

(2) Alternative position. If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employer may require such employee to transfer temporarily to an available alternative position offered by the employer for which the employee is qualified and that--

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Unpaid leave permitted. Except as provided in subsection (d), leave granted under subsection (a) may consist of unpaid leave. Where an employee is otherwise exempt under regulations issued by the Secretary pursuant to section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), the compliance of an employer with this title [29 U.S.C. §§ 2611 et seq.] by providing unpaid leave shall not affect the exempt status of the employee under such section.

(d) Relationship to paid leave.

(1) Unpaid leave. If an employer provides paid leave for fewer than 12 workweeks, the additional weeks of leave necessary to attain the 12 workweeks of leave required under this title [29 U.S.C. §§ 2611 et seq.] may be provided without compensation.

(2) Substitution of paid leave.

(A) In general. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or family leave of the employee for leave provided under subparagraph (A), (B), or (C) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection.

(B) Serious health condition. An eligible employee may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for leave provided under subparagraph (C) or (D) of subsection (a)(1) for any part of the 12-week period of such leave under such subsection, except that nothing in this title [29 U.S.C. §§ 2611 et seq.] shall require an employer to provide paid sick leave or paid medical leave in any situation in which such employer would not normally provide any such paid leave.

(e) Foreseeable leave.

(1) Requirement of notice. In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) Duties of employee. In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee--

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employer, subject to the approval of the health care provider of the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(f) Spouses employed by the same employer. In any case in which a husband and wife entitled to leave under subsection (a) are employed by the same employer, the aggregate number of workweeks of leave to which both may be entitled may be limited to 12 workweeks during any 12-month period, if such leave is taken--

(1) under subparagraph (A) or (B) of subsection (a)(1); or

(2) to care for a sick parent under subparagraph (C) of such subsection.

29 U.S.C. § 2614

§ 2614. Employment and benefits protection

(a) Restoration to position.

(1) In general. Except as provided in subsection (b), any eligible employee who takes leave under section 102 [29 U.S.C. § 2612] for the intended purpose of the leave shall be entitled, on return from such leave--

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits. The taking of leave under section 102 [29 U.S.C. § 2612] shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(3) Limitations. Nothing in this section shall be construed to entitle any restored employee to--

(A) the accrual of any seniority or employment benefits during any period of leave; or

(B) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(4) Certification. As a condition of restoration under paragraph (1) for an employee who has taken leave under section 102(a)(1)(D) [29 U.S.C. § 2612(a)(1)(D)], the employer may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work, except that nothing in this paragraph shall

supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

(5) Construction. Nothing in this subsection shall be construed to prohibit an employer from requiring an employee on leave under section 102 [29 U.S.C. § 2612] to report periodically to the employer on the status and intention of the employee to return to work.

(b) Exemption concerning certain highly compensated employees.

(1) Denial of restoration. An employer may deny restoration under subsection (a) to any eligible employee described in paragraph (2) if--

(A) such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer;

(B) the employer notifies the employee of the intent of the employer to deny restoration on such basis at the time the employer determines that such injury would occur; and

(C) in any case in which the leave has commenced, the employee elects not to return to employment after receiving such notice.

(2) Affected employees. An eligible employee described in paragraph (1) is a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed.

(c) Maintenance of health benefits.

(1) Coverage. Except as provided in paragraph (2), during any period that an eligible employee takes leave under section 102 [29 U.S.C. § 2612], the employer shall maintain coverage under any "group health plan" (as defined in section 5000(b)(1) of the Internal Revenue Code of 1986 [26 U.S.C. § 5000(b)(1)]) for the duration of such leave at the level and under the conditions coverage would have been provided if

the employee had continued in employment continuously for the duration of such leave.

(2) Failure to return from leave. The employer may recover the premium that the employer paid for maintaining coverage for the employee under such group health plan during any period of unpaid leave under section 102 [29 U.S.C. § 2612] if--

(A) the employee fails to return from leave under section 102 [29 U.S.C. § 2612] after the period of leave to which the employee is entitled has expired; and

(B) the employee fails to return to work for a reason other than--

(i) the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave under subparagraph (C) or (D) of section 102(a)(1) [29 U.S.C. § 2612(a)(1)]; or

(ii) other circumstances beyond the control of the employee.

(3) Certification.

(A) Issuance. An employer may require that a claim that an employee is unable to return to work because of the continuation, recurrence, or onset of the serious health condition described in paragraph (2)(B)(i) be supported by--

(i) a certification issued by the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(C) [29 U.S.C. § 2612(a)(1)(C)]; or

(ii) a certification issued by the health care provider of the eligible employee, in the case of an employee unable to return to work because of a condition specified in section 102(a)(1)(D) [29 U.S.C. § 2612(a)(1)(D)].

(B) Copy. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(C) Sufficiency of certification.

(i) Leave due to serious health condition of employee. The certification described in subparagraph (A)(ii) shall be sufficient if the certification states that a serious health condition prevented the employee from being able to perform the functions of the position of the employee on the date that the leave of the employee expired.

(ii) Leave due to serious health condition of family member. The certification described in subparagraph (A)(i) shall be sufficient if the certification states that the employee is needed to care for the son, daughter, spouse, or parent who has a serious health condition on the date that the leave of the employee expired.

29 U.S.C. § 2615

§ 2615. Prohibited acts

(a) Interference with rights.

(1) Exercise of rights. It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this title [29 U.S.C. §§ 2611 et seq.].

(2) Discrimination. It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title [29 U.S.C. §§ 2611 et seq.].

(b) Interference with proceedings or inquiries. It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual--

(1) has filed any charge, or has instituted or caused to be instituted any proceeding, under or related to this title [29 U.S.C. §§ 2611 et seq.];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding relating to any right provided under this title [29 U.S.C. §§ 2611 et seq.]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under this title [29 U.S.C. §§ 2611 et seq.].

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER V -- WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER C -- OTHER LAWS
PART 825 -- THE FAMILY AND MEDICAL LEAVE ACT OF 1993
SUBPART A -- WHAT IS THE FAMILY AND MEDICAL LEAVE ACT, AND TO WHOM DOES IT APPLY?

29 CFR 825.114

§ 825.114 What is a "serious health condition" entitling an employee to FMLA leave?

(a) For purposes of FMLA, "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e. , an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery

therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g. , physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (e.g. , asthma, diabetes, epilepsy, etc.).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider,

either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (e.g. , an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g. , oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not "serious health conditions" unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. , are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health

conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

29 C.F.R. 825.115

§ 825.115 What does it mean that "the employee is unable to perform the functions of the position of the employee"?

An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 et seq. , and the regulations at 29 CFR § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

29 CFR 825.203

§ 825.203 Does FMLA leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition.

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider

periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in §§ 825.601 and 825.602.

29 CFR 825.305

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some

later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

Supreme Court, U.S.
FILED
AUG 16 2006
OFFICE OF THE CLERK

(2)

No. 06-68

IN THE

Supreme Court of the United States

KENNETH A. MAUDER,

Petitioner,

v.

METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY C. LONDA
Counsel of Record
MICHAEL D. MITCHELL
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002-4709
(713) 655-0855

Attorneys for Respondent

202885

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals properly affirmed summary judgment dismissal of Plaintiff's claim under the Family and Medical Leave Act pursuant to the undisputed material facts contained in the record.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
Reasons for Denying the Petition	4
I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.	4
II. The Petition Fails On The Merits.	6
A. The Fifth Circuit Correctly Ruled That Petitioner Was Not Incapacitated Under The FMLA Because The Petitioner Did Not Show That He Was Unable To Work.	6
B. Petitioner Cannot Establish That Metro "Denied" Or "Interfered" With His Alleged Right To Unscheduled Restroom Breaks Because Metro Never Prevented Petitioner From Going To The Restroom.	8
C. Petitioner's Allegations That He Was Disciplined And Discharged Do Not State Claims For Denial Of Substantive FMLA Rights.	9

Contents

Page

D. Petitioner's Eleventh Hour Request For FMLA Leave Did Not Require Metro To Suspend Its Previously Planned Discharge Of Petitioner. 10

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

CASES

Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (M.D. Tenn. 1995) 7

Chaffin v. John H. Carter Co., Inc., 179 F.3d 316 (5th Cir. 1999) 9, 10

Clark County School District v. Breeden, 532 U.S. 268 (2001) 11

Haley v. Alliance Compressor LLC, 391 F.3d 644 (5th Cir. 2004) 10

Marchisheck v. San Mateo County, 199 F.3d 1068 (9th Cir. 1999) 7

Mauder v. Metropolitan Transit Authority, 446 F.3d 574 (5th Cir. 2006) 2, 6

Price v. Marathon Cheese Corp., 119 F.3d 330 (5th Cir. 1997) 7

Cited Authorities

Page

STATUTES

29 C.F.R. § 825.114(a)(2)(i) (2006) 2, 6

29 C.F.R. § 825.114(e) 6

29 C.F.R. § 825.115 ..... 6, 7, 8

29 C.F.R. § 825.305(b) 11

Sup. Ct. R. 10. 4

STATEMENT OF THE CASE[1]

Petitioner filed this lawsuit against Respondent the Metropolitan Transit Authority of Harris County, Texas ("Metro") in the United Stated District Court for the Southern District of Texas, Houston Division on January 13, 2003.[2] (R. 7). In his First Amended Complaint, Petitioner asserted claims for alleged violations of the American with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"). (R. 23). On June 22, 2004, Metro filed its Motion for Summary Judgment ("Metro's Motion"). (R. 145). In his Response to Metro's Motion, Petitioner expressly abandoned his ADA claims. (R. 391). On March 28, 2005, the District Court granted Metro's Motion for Summary Judgment in all respects and entered a Final Judgment in favor of Metro. (R. 515-527).

On Appeal, the Fifth Circuit affirmed the judgment of the District Court. The Fifth Circuit's holding is two-fold, addressing both Petitioner's claim for "temporary leave" under the FMLA, as well has his retaliation claim under the FLMA. However, Petitioner has not sought to challenge or appeal the dismissal of his retaliation claim in his Petition for Writ of Certiorari. Accordingly, the only relevant portion of the Fifth Circuit's ruling is that which deals with Petitioner's FMLA claim under the Act's "entitlement

---

1. Unless otherwise noted, citations set forth herein are to the Fifth Circuit Record.

2. Metro is a public entity established by Texas Civil Statute Article 1118x pursuant to voter approval of a regional referendum held on August 12, 2978. Article 1118x is now codified in Chapter 451 et. seq. of the Texas Transportation Code.

provision." In that regard, the Court of Appeals ruled as follows:

> Based on the facts of this case, even assuming arguendo that Mauder has satisfied the requirements for a 'serious medical condition' for either diarrhea or diabetes under the FMLA, the record reflects that he has not shown that this serious medical condition left him incapacitated, as required by the statute.

Mauder v. Metropolitan Transit Authority, 446 F.3d 574, 581 (5th Cir. 2006).

Moreover, after citing numerous cases from courts across the country which have addressed the issue, the Fifth Circuit concluded as follows:

> . . . Furthermore, as we have previously explained the FMLA recognizes diabetes as an example of a chronic serious health condition that may cause episodic rather than a continuing period of incapacity.
>
> Accordingly, we find that Mauder has not shown that the was incapacitated or that his condition prevented him from going to work. 29 C.F.R. § 825.114(a)(2)(i) (2006)(explaining that the statute applies when one is unable to work due to a serious health condition, treatment therefore, or recovery therefrom). He does not meet the requirements of 29 C.F.R. § 825.114(a)(2) – the regulation defining a 'serious health condition involving continuing treatment by a healthcare provider' for purposes of FMLA leave.

Id. Accordingly the Court held as follows:

> Therefore, because Mauder has not proven that his medical condition left him incapacitated even temporarily, we hold that the district court did not err in determining that Mauder was not entitled to FMLA leave. 29 C.F.R. § 825.114(a)(2).

Id. at 582.

Additionally, the court also noted that:

> . . . the record is clear that Metro should also not be held accountable for not providing Mauder with FMLA leave because Mauder did not provide information requested by Metro that was needed to process Mauder's demands for flexible bathroom breaks.

Id. Therefore, the court also ruled that:

> Mauder's failure to provide his employer with requested information to effectuate the leave he asked for in the first place is a sufficient reason for us to hold that the district court did not err in granting summary judgment in favor of Metro on this issue. Mauder was not entitled to leave under the FMLA.

Id. 582-83.

REASONS FOR DENYING THE PETITION

I. The Petition Does Not Satisfy This Court's Requirements For Granting Certiorari.

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10. Rule 10 lists the following examples of the types of cases in which the Court may grant certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Id. Conversely, Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Petitioner's Petition should be denied because there are no "compelling reasons" for granting certiorari in this case. This case does *not* involve (1) a conflict among United States courts of appeals, (2) a conflict between a United States court of appeals and a state court of last resort, (3) a conflict on an important federal question among state courts of last resort, or (4) a conflict between this Court's decisions and the decisions of lower courts. Rather, this case involves nothing more than a garden variety claim of alleged employment discrimination. Moreover, the asserted error in this case regarding the Fifth Circuit's alleged "misconstruing" of the applicable regulation (*see* Petition at page 22) is in actuality nothing more than allegations of erroneous factual findings. While framing the issue as one of interpretation of a federal regulation, on pages 22 and 23 of the Petition for Writ of Certiorari, Petitioner does nothing more than attempt to argue that the Fifth Circuit made erroneous factual findings or misapplied properly stated rules of law. Indeed, Petitioner specifically asserts at page 23 of his Petition that "[t]here is factual a sufficiency issue worth of this Court's review." [Sic.] Those are precisely the type of allegations which Rule 10 provides are not appropriate for certiorari. Accordingly, Petitioner's Petition should be denied.

II. The Petition Fails On The Merits.

A. The Fifth Circuit Correctly Ruled That Petitioner Was Not Incapacitated Under The FMLA Because The Petitioner Did Not Show That He Was Unable To Work.

Petitioner's core argument is that the Fifth Circuit erred in ruling that diarrhea is incapacitating for purposes of the FMLA only where it is "so debilitating that the employee cannot physically go to work." (*See* Petition at page 15). (quoting *Mauder*, 446 F.3d at 581). Citing 29 C.F.R. §§ 825.114 and 825.115, Petitioner asserts that "incapacity" does not require absence from or inability to work. However, the very regulations the Petitioner cites directly contradict Petitioner's argument. First, 29 C.F.R. § 825.114(a)(2)(i) defines "a period of incapacity" as "*inability to work*, attend school or perform other regular activities due to the serious health condition, treatment therefore, or recovery therefrom." 29 C.F.R. § 825.114(a)(2)(i) (emphasis added). Further, 29 C.F.R. § 825.114(e) provides the following two examples of FMLA protected incapacity:

> For example, an employee with asthma *may be unable to report for work* due to the onset of an asthma attack or because the employee's health care provider has *advised the employee to stay home* when the pollen count exceeds a certain level. An employee who is pregnant *may be unable to report to work* because of severe morning sickness.

29 C.F.R. § 825.114(e) (emphasis added).

In addition, the Fifth Circuit and other courts have repeatedly held that "incapacity" under the FMLA requires inability to work. *See Price v. Marathon Cheese Corp.*, 119 F.3d 330, 334-35 (5th Cir. 1997), (holding that plaintiff did not have a "chronic serious health condition" where her doctor never took her off work "altogether"); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F.Supp. 1028, 1035-37 (M.D. Tenn. 1995) (same); *Marchisheck v. San Mateo County*, 199 F.3d 1068, 1075 (9th Cir. 1999) (holding that alleged psychological problems did not amount to a chronic serious health condition because "there is no evidence whatsoever in the record that Shaun suffered any ***period of incapacity – inability to perform regular daily activities***") (emphasis added).

Section 825.115 also provides no support to Petitioner. In pertinent part, that provision states as follows:

> "An employee is 'unable to perform the functions of the position' ***where the health care provider finds*** the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position. . . . An employee ***who must be absent from work to receive medical treatment*** for a serious health condition is considered to be unable to perform the essential functions of the position ***during the absence for treatment.***

29 C.F.R. § 825.115 (emphasis added). As an initial matter, the record is devoid of any finding by Petitioner's doctor that Petitioner was "unable to work at all" or "unable to perform any one of the essential functions of [Petitioner's] position. To the contrary, Petitioner's doctor released him to

return to work without any medical restrictions. (R. 226, 373). Likewise, although Section 825.115 states that employees who are "absent from work to receive medical treatment" are considered "unable to perform the essential functions" of their jobs, Petitioner never sought treatment for his alleged diarrhea and Petitioner's doctor never provided any such treatment. (R. 184, 219, 380). Thus, 29 C.F.R. § 825.115 simply does not support Petitioner's assertion that he was incapacitated within the meaning of the FMLA.

B. Petitioner Cannot Establish That Metro "Denied" Or "Interfered" With His Alleged Right To Unscheduled Restroom Breaks Because Metro Never Prevented Petitioner From Going To The Restroom.

Petitioner contends that Metro "unlawfully denied [him] his rights under the FMLA" and "interfered with [his] rights under the FMLA." (*See* Petition at page 3). In this regard, Petitioner asserts that he should have been granted "intermittent leave" for "restroom breaks." (*See* Petition at page 18). However, Petitioner ignores the fact that *Metro never prevented the [him] from going to the restroom.* (R. 215, 327). Indeed, Petitioner testified "If I had to go to the restroom, I went to the restroom." (R. 215). Petitioner also testified that he never soiled himself at Metro as a result of failing to make it to the restroom in time. (R. 377). Thus, if (as Petitioner contends) each restroom break constituted an instance of "intermittent" FMLA leave, then Petitioner took all the "leave" to which he allegedly was due. Likewise, if (as Petitioner also contends) each restroom break constituted an instance of "intermittent leave," then it would also have to be the case that Petitioner was "reinstated" to his job every time he returned to his desk following a trip to

the restroom. However, *there is no evidence whatsoever in the record indicating that Petitioner was ever prevented from returning to his desk to continue working following any trip to the bathroom*. Accordingly, Petitioner's substantive violation claim fails as a matter of law.

C. Petitioner's Allegations That He Was Disciplined And Discharged Do Not State Claims For Denial Of Substantive FMLA Rights.

Petitioner's allegations that he was disciplined and ultimately discharged for going to the restroom do not state claims for denial of substantive FMLA rights. The Fifth Circuit has held that "employers have a prescriptive obligation under the FMLA – they must grant employees substantive rights guaranteed by the FMLA – and they have a proscriptive obligation – they may not penalize employees for exercising their rights." *Chaffin v. John H. Carter Co., Inc.*, 179 F.3d 316, 319 (5th Cir. 1999).

The Fifth Circuit has also explained the difference between those prescriptive and proscriptive rights:

> Under the FMLA, an eligible employee is entitled to take up to 12 work weeks of leave in a 12-month period when, *e.g.*, the employee has a serious health condition that makes her unable to perform the duties of her position. After a qualifying absence, the employer must restore the employee to the same position previously held by the employee before taking leave under the FMLA or a comparable position, with equivalent pay, benefits, and working conditions. **These comprise the prescriptive or substantive FMLA rights;**

> **claims for violations of these rights invoke entitlement or interference theories** and are brought under § 2615(a)(1). **The proscriptive FMLA rights include an employee's right not to be discriminated against for having exercised the right to take FMLA leave.** Claims for violations of these rights are brought under § 2615(a)(2). **These proscriptive FMLA provisions create a cause of action analogous to the actions for discrimination and for retaliation that are found in Title VII and the other discrimination statutes.**

Haley v. Alliance Compressor LLC, 391 F.3d 644, 649 (5th Cir. 2004) (emphasis added) (internal citations omitted). Thus, Petitioner's allegations that he was penalized and discharged for going to the restroom do not state a claim for violation of any alleged substantive FMLA rights. *See Chaffin*, 179 F.3d at 319 ("Chaffin makes no claim that Cater denied her a substantive entitlement under the FMLA. *Rather, she contends that Carter punished her for exercising her right under the FMLA to take leave. She therefore is asserting a violation of a proscriptive duty.*") (Emphasis added.)

D. Petitioner's Eleventh Hour Request For FMLA Leave Did Not Require Metro To Suspend Its Previously Planned Discharge Of Petitioner.

Petitioner was placed on a one-month corrective action plan, effective September 13, 2002. (R. 250-251). Petitioner was advised that the corrective action period would end on October 11, 2002, and he was advised that "[f]ailure to adhere to the established guidelines during the 30 day probationary

period, and thereafter, will result in immediate termination." (R. 251). Indeed, in his deposition, Petitioner admitted that he knew he could be terminated if he did not improve his performance by the October 11, 2002 deadline. (R. 218). On October 4, 2002, exactly one week before the conclusion of the corrective action period, Petitioner made a request for FMLA leave. (R. 27, 200, 202, 265). Petitioner asserts that 29 C.F.R. § 825.305(b), which provides that employers must allow employees 15 days to return FMLA certification forms, required Metro to suspend its previously planned decision to discharge [him] at the conclusion of the corrective action period. As explained below, this Court has previously ruled that arguments such as those made by Petitioner in this regard have no merit.

"***Employers need not suspend previously planned [employment actions] upon discovering that [an employee has engaged in protected conduct]***, and their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality." *Clark County School District v. Breeden*, 532 U.S. 268, 272 (2001) (emphasis added). Although *Clark County* is a Title VII case, it is instructive and factually analogous to this case. In *Clark County*, the plaintiff in part alleged that she had been transferred to a different position in retaliation for filing a Title VII action. *Clark County*, 532 U.S. at 271. The evidence showed that the plaintiff filed her lawsuit on April 1, 1997, and, on April 10, 1997, the plaintiff's supervisor "mentioned" to the president of the plaintiff's union that she was "contemplating" transferring the plaintiff. *Id.* at 271-72. The actual job transfer occurred in May. *Id.* at 272. The employer filed a motion for summary judgment, arguing that there was no causal connection between the filing of the plaintiff's lawsuit and the transfer.

Id. In response, the plaintiff relied on the temporal proximity between the filing of her lawsuit and her supervisor's statement that she was contemplating transferring the plaintiff. *Id.*

The district court granted the employer's motion for summary judgment based on the fact that the defendant was not served with the lawsuit until April 11, 1997 (i.e., one day after the supervisor's remark) and based on the supervisor's uncontradicted testimony that she did not learn of the lawsuit until after April 11, 1997. *Id.* Thus, the district court found no causal connection between the lawsuit and the transfer because the employer was already *considering* taking the allegedly adverse employment action against the plaintiff before it learned of the plaintiff's protected conduct.

The Ninth Circuit Court of Appeals reversed, relying in part on the fact that the actual transfer occurred one month after the supervisor learned of the plaintiff's lawsuit. *Id.* This Court reversed the Ninth Circuit, finding that the fact that the actual transfer occurred after the supervisor learned of the lawsuit was "immaterial in light of the fact that [the supervisor] concededly was ***contemplating*** the transfer before [she] learned of the suit." *Id.* (emphasis added). Rather, this Court held that "**[e]mployers need not suspend previously planned [employment actions] upon discovering that a Title VII suit has been filed, and their** *proceeding along lines previously contemplated, though not yet determined, is no evidence whatever of causality.*" *Id.* (emphasis added).

The policy rationale behind that rule is clear and equally applicable in FMLA cases as it is in Title VII cases. Specifically, if an employee who knows he or she is about to

be fired for poor performance can forestall the discharge simply by asserting an entitlement to FMLA leave, no planned employment termination could ever be implemented. A clever employee could repeatedly postpone his planned discharge every 15 days by simply asserting and reasserting a need for FMLA leave. In the context of Title VII retaliation claims, this Court has ruled that such last minute assertions of protected rights do not prevent an employer from following through on a previously planned employment decision. Petitioner has cited no case nor presented any reason for treating an employer's FMLA obligations differently.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

JEFFREY C. LONDA
Counsel of Record
MICHAEL D. MITCHELL
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
500 Dallas Street, Suite 3000
Houston, Texas 77002-4709
(713) 655-0855

Attorneys for Respondent